ALTERNATIVE DISPUTE RESOLUTION
FOR CONSUMER TRANSACTIONS
IN THE
BORDERLESS ONLINE MARKETPLACE

MODERATORS:

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MR. STEVENSON: While we're waiting to get started, I'll just mention to people who are later on having the breakout sessions, and if you picked up a packet at the front, there is a piece of paper in it that indicates which breakout session you should attend, and we're trying to break into smaller groups and have as many people make contributions as we can.

Okay, we're ready to get started. It's my pleasure to introduce our first speaker, Commissioner Mozelle Thompson from the Federal Trade Commission. Commissioner Thompson has focused on a number of issues as commissioner, including international consumer protection. He is head of the U.S. Delegation for Consumer Policy Committee of the OECD, the committee that produced the guidelines that various people have been talking about over the past day.

Commissioner Thompson?

MR. THOMPSON: Good morning. I don't know -- because there are a few of you here, I guess the cocktail party was really good last night. (Laughter.) But -- and I always find it kind of interesting when I come to these kinds of events, because I can tell by where you sit where you used to sit when you were in

class, you know. (Laughter.)

So -- well, I'm excited to be here, and I wanted to begin by commending everyone who's participating in these two days of discussions, because I think what it represents -- at least what I've seen, is the most comprehensive two days I've seen internationally on the subject of alternative dispute resolution in the online environment, and I also particularly want to commend the folks at the Department of Commerce and the staff at the FTC, who both worked very hard in putting this event together. So, before I go too much further, I give you a hand.

(Applause.)

MR. THOMPSON: I also want to commend, though, also some of the companies who are participating in this event for a couple of reasons.

First of all, this is not to -- I'm not going to discount the fact that there are some -- there is some value to participating. I mean, in the sense that I never knew that there were that many first movers in one place at one time, but also companies who are here to talk about their ideas in a candid fashion and subject their ideas to scrutiny, because there are a lot of folks who are out there who are involved in this area who aren't willing to come forward and actually

discuss what potential improvements, criticisms and other views that you, the members of the public, might have about what they're doing. So, I think they deserve some credit, as well.

Because in many cases, the people who come here and are willing to talk are people who represent the good guys, people who have some vision about what's going to happen in the future and the -- and some great optimism about our role in shaping what may happen in the future conduct between buyers and sellers in the online environment. And I guess maybe that's a good place to start.

As you heard, and for some of you who are here today, especially some of our international colleagues who spent a lot of time working with the OECD Consumer Policy Committee, many of you may recognize how important we all believe that ADR was as an element, a critical element, to how consumers are going to be treated in the future.

As we begin to look at how we write or rewrite the ground rules for how buyers and sellers treat each other, that we look at a panoply of elements that consumers find important.

And, in fact, the interesting thing about the internet itself is it's a very consumer-driven and

consumer-empowering tool. What that means is that for concepts like e-commerce to be meaningful, that what consumers' concerns are, including how to get redress for instances where the transactions that they may be involved in are not as what they expected, it's going to be very important.

So, it's important to recognize the idea of ADR is critical, but on the other hand, it sits within a panoply of sort of touchstone elements, like data protection, security and other concepts that consumers are going to find need to be addressed in order for e-commerce to be meaningful for them.

Now, in sitting through some of the discussions I saw yesterday, there are a couple of things that I wanted to just touch on a little bit.

One is an observation that for many people here in this room that have worked on parts of alternative dispute resolution and focused on some of those questions in the online environment, but what you may see, and I'm happy to say that yesterday, for example, at least one group announced -- of companies -- announced an initiative that they were planning to engage in as sort of a self-regulatory, best practices -- set of best practices -- but what I think is important is to view the context, because what I saw

yesterday was a broad range of ideas talking about what ADR could be and to address a range of problems.

So, what was clear to me is that one size may not fit all, and that's going to be a challenge for us in beginning to define what the ranges of consumer demands are in this area and what the appropriate responses are.

So, what you heard yesterday was a little bit about an effort of bringing together collective thought about ADR. What you saw was some international transparency -- the willingness of people to discuss their ideas. An important concept about cooperation is to recognize that neither the business community nor consumers nor government in and of themselves are going to have the right answer, but the answers are going to be found through cooperation.

And that at least for me, one thing that was very important was that government is seeking to incentivise innovation, to recognize that there are a variety of new ideas that may, indeed, be responsive to consumer needs here.

So, today, what we have is some very interesting and challenging panel discussions and a breakout, which I'd like you to make good use of. And what would be at least helpful from my standpoint in

listening is to not necessarily to focus on what a lot of people would like to jump so, well, let's have standards, but to focus on bundles of ideas, categories of issues that we might be able to group together and begin to think about how they relate to each other.

Second is to consider, as we go forward, how do we actually listen to and incorporate the views of stakeholders, and the other thing I've seen is that there are a variety of stakeholders, consumers, businesses and governments.

And, finally, which I think is critical, is to recognize that what you're hearing today should be viewed as the first step in a continuing dialogue to talk about the issues raised by alternative dispute resolution, but also -- and this is the harder part -- is for us all to identify opportunities for cooperation.

So, I welcome you all here. I think this is a very exciting time for all of us, and we have a pretty substantial challenge ahead of us and a challenge that's going to be measured in internet time. So, I'm curious to see how this day works out, and I hand it back over to you.

(Applause.)

MR. STEVENSON: Okay, well, we're ready to

start our first panel of the day, what issues need to be addressed in conducting ADR in the online marketplace. And we have a large group here, as if to prove, I guess, the proposition that one size does not fit all, this panel barely fits on the stage.

But this panel I'd like to focus this by picking up on something which Hank Perritt said yesterday, which I thought -- it stuck in my mind -- is that you've got to think about the component for making rules, for applying rules and for enforcing rules. And those are some of the topics that I think are before us or that would be helpful to talk about today.

And one of the questions that we have down is what kind of procedural rules, if any, should apply to ADR. I'd like to focus on, I think, in particular arbitration for the procedural and substantive rule questions. What rules do you play by and also how visible should this whole process be and how visible should the results be, of these kinds of processes?

Let's start with the procedural question, and before I do, I'll introduce the panel.

We have John Bickerman from the Bickerman Dispute Resolution Group; Nora -- I'm sorry, Lorraine Brennan from the USCIB; then Nora Femenia from Inter-Mediacion; Dawn Friedkin from OECD and formerly

of the Department of Commerce; Richard Leighton from Keller & Heckman; Brenda Pomerance, OnLine Disputes.org; Alice Sullivan from Privatejudge.com; Wendy Weinberg from NACAA; John Welsh -- no, I'm sorry, pinch-hitting or designated hitting for Jamie Love is Robert Weissman from the Consumer Project on Technology; and then John Welsh, general counsel and vice president from JAMS.

John, maybe I could start by asking you a question to kick it off. What kind of procedural rules should apply in various ADR, and should we look to international commercial arbitration as a model for the ICC ?

MR. WELCH: I think that the procedural and substantive rules are going to differ depending upon the marketplace. Last year we did 30,000 cases, 18,000 of which were the black farmer individual arbitrations on a class action. And we had a different set of rules that we applied and we were asked to apply for that group of claims. And I think that when you get into different marketplaces and with different groups, you're going to have different sets of rules, and there are knotty issues, there are very tough issues when you begin to think about binding adjudications of consumer claims.

You have the primary issue that I'm sure people are going to talk about here of whether or not it's voluntary or involuntary, whether or not the marketplace can require -- should require -- a consumer to have a binding arbitration through the process that is dictated by the company.

But I think that one of the things that we have to talk about on this panel is the streamline, the fairness to the consumer. The one thing that I would like to see and that I see companies try to do, companies often try to gain an edge by their rules that they have in ADR. They want to get an edge because the one stakeholders -- the one group of stakeholders that aren't here are lawyers, and lawyers or companies and lawyers for clients dictate what happens in a dispute, and when companies try to gain an edge in adopting rules, that's when we in the industry, I think, have to police ourselves.

MR. STEVENSON: Okay, I can't remember the last time I was in a meeting where someone said we were short on lawyers, but I think we do have someone from ATLA coming later. That's a fair point.

On the -- looking to -- we're obviously focusing here particularly on commercial -- excuse me, consumer disputes, which are small, and I think Ronna

Brown yesterday said that a lot of disputes, for example, BBBC's, are typically $3,000 or under. A large percentage of these are really very small claims from the attorneys' perspectives, if not the consumers'.

Are the existing -- how does that square with the kind of existing commercial arbitration rules of procedures that exist? Are they useful, and, for example, the ICC stuff?

MR. WELSH: My understanding, and I'm no expert on ICC rules, but normally the International Arbitration rules are very cumbersome. And I think that if people are going to be able to do large numbers of consumer arbitrations, the rules have to be streamlined, the costs obviously have to be manageable or no one is going to do it, and the results have to be fair. And we run into these tremendous issues when we cross borders as to whose law applies and enforcement. And there's no easy answer to the three major, language, whose law applies and enforcement. And those I think are three of the major issues in the cross borders.

MS. WELLBERY: If I could follow up with another question, please. Do you think that there is a correlation between the cost of the proceeding and the

procedures that are imposed on the proceeding?

MR. WELSH: Well, yes, because you don't want the company -- if you're making the assumption that the consumer is in pro per and unrepresented, then you don't want the process to be skewed toward the company which can have a lawyer or a professional that does a lot of them. It's like the issue of the insurance claims rep who does a lot of mediations or manages a lot of cases with one individual pro se or in pro per client -- consumer.

MR. STEVENSON: Lorraine Brennan, if you would like to comment on that, and also I should say for the rest of the panelists, if you would like to comment on something that somebody says, please feel free to raise your tent.

MS. BRENNAN: I would like to address the issue of the commercial arbitration entities. The U.S. Council for International Business is the U.S. affiliate of the International Chamber of Commerce in Paris, France. So, I feel that I can speak to the rules of the institution and basically draw from those what has worked over the last 77 years for the ICC, which is flexibility.

I would take issue with my colleague and say that the ICC rules are, indeed, not cumbersome at all,

especially when compared -- nor are the rules of many of the other institutions, especially when compared with, for example, the Federal Rules of Civil Procedure.

The ICC rules, the AAA rules, the WIPO rules are all in a small booklet. Well, granted, I would agree with you, it's not practical to have a commercial dispute with a consumer at a large -- arbitral institution. What we can draw from these institutions is the things that have worked well, and one of those things is flexibility.

The ICC's been around 77 years, and we have had over 100 countries participate in disputes. So, what that tells us is those rules work, and they work -- one of the reasons they work well is because they're very flexible.

MR. STEVENSON: Lorraine, to follow up on that, could you tell us what kind of experience the ICC has had in consumer disputes? Has there been much in that -- of that type of dispute?

MS. BRENNAN: The bulk of the ICC's commercial disputes, of course, are large commercial disputes, but what the ICC is doing now is looking at the issue, because we are the world business organization. We have national committees in over 60 countries. So, we

are looking at how we can act to help consumer disputes. Maybe we will be acting as a clearinghouse for these disputes. Maybe we'll become a service provider. We are looking at the issue.

We also have had a lot of experience with smaller disputes through our expertise center, which is quite different from the arbitration center. So, those have been lower dollar value.

MR. STEVENSON: Okay. Richard Leighton, if you would like to comment.

MR. LEIGHTON. Yeah, one size probably won't fit all well, but there are -- one size may fit all loosely, it seems to me, or parts of one size. There are certain things that are emerging now that are going to be, I think, universal.

First of all, in the rules, if you want to call them rules, that's probably not a good thing to call them if you're communicating them to consumers, but in rules, you should have them, one, and they should be available predispute in plain language, depending on what the language is, so that people can understand them.

Even before you have the rules, you should have dispute avoidance information out there and access: 800 numbers, websites, a lot of questions, instructions

and things like that.

Obviously, there's a panoply or spectrum in ADR beginning with party to party, business representative, customer representative, to consumer, all the way up to formal adjudications and arbitration, but it's very, very broad. The further along you get to that spectrum, the more you need rules. At the lower end, the less rules, the better.

Basically, if you can get a mechanism for what do you want when the consumer calls, you'd be surprised at the large majority percentage of businesses can give the consumer what he or she wants, whether or not the consumer's right, and it goes away, and so you have to start at that point. Without rules, without something that's inhibiting, and with the option of either voice to voice or click for people that are -- get worried by voice. But you need them -- honesty is still the best policy, and all the old traditional things still work, and you just need to follow through.

You need to have opportunities for counsel if they want counsel, but also, you need to take into consideration if they don't want counsel -- the consumer I'm talking about now. You need to have I think, unless the parties agree, I don't think you should preempt other remedies. You need to have both

the appearance and the actuality of equal treatment, especially the further along you get in that spectrum.

MR. STEVENSON: John Bickerman, the smaller the claim, the fewer the rules, is that right?

MR. BICKERMAN: Well, no, not necessarily. I think that the foundation of procedural rules, the reason we have procedural rules is to ensure fairness, and that's the idea behind the Federal Rules of Civil Procedure in federal court, and I think that's something -- that's one of the motivating factors in designing procedural rules for the disputes that we're talking about involving consumers.

At the same time, rules cost money. The dispute resolution system is going to cost money. And there may be a direct correlation to the complexity of the rules, in terms of increasing fairness, but also increasing costs, and then you ask the question, Well, who's going to bear that cost?

Consumers who have small claims probably are not going to bear that cost. If businesses bear that cost, and they're the ones paying for the dispute resolution system, and you introduce a problem of fairness at times. You introduce the problem of repeat players. You are not going to want to get a $400 an hour mediator to resolve a $3,000 consumer dispute.

So, there's a real tension here in terms of designing procedural rules that ensure fairness and that also do it efficiently enough so that the cost of the dispute resolution system that you design is cost-effective for the types of disputes that you are resolving. You don't want the system to cost more than the dispute that you're going to resolve, and I think and that that's a very difficult challenge.

MR. STEVENSON: Okay. Well, one of the things, when we're talking about one size doesn't fit all, one size is the size of the claim, and that's one distinguishing attribute is within the class of what is called the small claims that are, say, under $3,000, under $5,000 or under $10,000, is that -- are those claims likely to be similar enough to have one set of rules or should there be many sets of rules?

MR. BICKERMAN: I think one set of rules. I think the other value that Richard Leighton just talked about in terms of procedural rules is predictability. People ought to be able to know how a dispute is going to be resolved, and while flexibility is good generally, and I think that that's an important concept, I think consistency is important, and I think that if we can agree on a system that will be used to resolve the equivalent to the small claims cases, that

will be helpful and may, indeed, create the kind of confidence, and that's the idea behind standard rules, is to create confidence in the system.

MS. WELLBERY: It seems to me a little bit that we're putting the cart before the horse, because it seems first we need to have a discussion of whether arbitration or mediation or what the appropriate approach to the smaller disputes are, and then maybe we can talk about whether there should be some sort of rules or what -- but it seems to me we haven't -- perhaps it's just me, but I still need to hear a full discussion of whether for these smaller dollar amounts arbitration or mediation is preferable, or again, is that too global a question, and does it really depend on some other factors that we haven't discussed yet?

I know, John, that you have some views about that, so feel free.

MR. BICKERMAN: I mean, I'm a mediator, and if I was looking for full employment for mediators, I'd certainly be promoting mediation, but my sense is that for small claims over great distances, mediation may not be the most effective system and that arbitration might be a more effective approach to resolving these claims.

In particular, a system that I think was

mentioned yesterday, I apologize I wasn't here yesterday, but I know that Tour Industries, which is a company that builds a product that causes a fair amount of claims to be generated, has an arbitration system in which they bind themselves -- the company is bound -- but the individual is not.

And in small claims of, you know, say $5,000 or less, an arbitration system in which the company agrees to be bound but the claimant still has the right to pursue legal action if they're dissatisfied, might be a very effective approach to looking at it.

The problem with mediation is that -- maybe I have a -- people will disagree with me, but I have a view that mediation works best when people can participate in person and that it doesn't work as well by telephone or by point and click and writing down comments. So, my view is that arbitration would be preferable, but I suspect that's somewhat controversial.

MR. STEVENSON: Okay, Robert Weissman, do you have a different view on that or the same view?

MR. WISEMAN: We have some similar views on that. I think our starting position, which is both that of the Consumer Project on Technology and also that of the Trans-Atlantic Consumer Dialogue, which

represents 65 groups, is that ADR has to be a voluntary system. It has to be an opt-in system for the consumer, and if that's the case, then you have to have some kind of exigent rules, and make it clear to the consumer what they're getting into if they choose to go into -- if they take the ADR route.

We do think that the model of binding arbitration on the business side with a nonbinding -- with nonbinding result for the consumer side is an attractive one, certainly especially in smaller claims.

There are also some basic rules that we think would have to be established in any kind of arbitration system, including simple kinds of notice rules and certain guarantees on enforcement of decisions that are rendered against businesses, perhaps through sanctions for trade associations or vendors against businesses that refuse to adhere to decisions of arbitrators.

And a final procedural concern for us -- or a couple of final concerns would be, one, that the arbitrators be independent and governed by something rules, and also there not be unreasonable time limits for appeal, which is a problem we're seeing in ICANN and some other contexts.

MR. STEVENSON: Now, Robert, to follow up on the point that John raised about the model where it's

-- where the arbitration is binding on business but not the consumer, but the consumer may have to go through that before whatever next step they might have. What's your reaction to that variation of it?

MR. WISE: We still don't want to see that as the mandatory requirement for consumers, even if consumers opt-in, we like that model, but we don't want consumers forced or channelled into a system that they may otherwise not want to get into. There are a variety of benefits, potentially, to going into the judicial system, and we don't think a consumer should ever be denied immediate access to that.

I think in practice, a lot of the ADR groups tend to lead to a dead end, either through just the difficulty of going through an ongoing process with limited consumer resources in small claims ,or by arbitrary and capricious time limits for appeals and other procedural difficulties.

MR. STEVENSON: Are there other views on the issue that Barbara raised on the -- whether these claims -- how much sense mediation makes versus arbitration? Do people have observations on that?

Richard?

MR. LEIGHTON. Yeah, it fits into the last question, I think, and I guess I disagree a little bit

with John as to whether arbitration makes more sense for these low-cost transactions than some form of mediation. Mediation, generally, when successful, and I think it's successful most of the time, is a win-win situation. Arbitration is a win-lose situation.

From the business perspective, if there's any chance you're going to lose, I don't think you should go into arbitration. I think you should try to have a win-win situation, because you run the risk of losing a loyal customer, and one loyal customer is a lot more valuable than two potential customers.

And from an appearance point of view and from a customer satisfaction point of view, I think what we're broadly calling mediation or negotiation, whatever you want to call it, fits the low-ticket item situation much better than arbitration. Because with arbitration and to assure fairness, both sides, which you have a neutral here, you can get quite arcane, and that may not be worth it for $50, may not be worth it, may be worth it for $2,000.

But for repetitive things, I see some sort of more flexible situation, without binding the consumer as to other rights, and from the point of view of both parties, it seems to me the most important thing is to get it over with quickly. If you're a business, get it

behind you. That's not what you do.

If you're a consumer, get it behind you. That's not what you do either. There's a tendency in some of these arbitrations, especially if you start down one path and then all of a sudden you're faced with a hundred of them, for them to get encrusted with prior knowledge, and they start creating their own procedures, and we do it this way and we do it that way. And sometimes you get into a situation of imbalance. The company which is doing it or its lawyers are doing it regularly, gets to know all of the neutrals, gets to know the angles, and the poor consumer on a one-shot deal comes in and it's a farce.

So, I would tend to try first, at the very least, the less rigorous forms of resolution, and obviously it's a lot cheaper.

MR. STEVENSON: Nora?

MS. FEMENIA: Okay, my name is Nora Femenia, and thank you, Richard, because you did say something that will allow me to explain my point of view.

I have a small company that deals with people from Latin America. My clients are mainly lawyers and professionals wanting to get trained in mediation and arbitration skills, and what I find in this

conversation is that perhaps we should go back to basics in the sense that we are talking here as if, and allow me this kind of comment, as if we all share the supposition that we have these models of mediation and arbitration that are universally valued, and I would like to tall your attention to two items.

First one is the fairness issue and the other is the outcome or the compliance. I think that we have little research done here in the U.S. of what happens when you have two sides at the mediation, face-to-face mediation table, where one side is Hispanic and the other side is Anglo -- forgive me the language again.

It depends on the mediator, but surely the outcome would be that the Anglo party, that is immersed in a culture for which winning and getting the most of the situation is a natural, is having an advantage, as the other side that is coming from a mind set in which things are shared.

Remember, the economy between either you care for your own things or you care for the relationship, well, if you would take that to extremes, the Hispanic party will be tending more to see the long development of the relationship in time, be willing to perhaps give more, and the other party is in a legitimate way fighting for whatever he or she can get.

So, this produces results that we can begin to look at as obviously unfair, because people are coming from different mind sets.

One of these examples that is easy for all of us to see is -- and forgive me, I'm coming from Miami, so I will mention the Elian dispute. Another time where you could see Janet Reno talking and telling the Cubans what is best in the situation, the Cubans understood that she was talking because there was something to be decided and that we were still negotiating while we were talking, they said.

They never understood that Janet Reno had a mind set and a task to accomplish, and she wanted the Cubans to understand that and to yield voluntarily.

That cultural clash produced some kind of extraneous spectacle in which two sides were talking and neither understood what they were up to. There were two different mind sets.

When we are trying to say, okay, how does mediation work in Latin America? Well, I'll tell you how it works. In my experience, it works only if you develop a relationship with people before. What does that mean? I am in Miami. I'm willing to help people that never saw me, that sometimes they send me an email or they saw my website, that they get into the airport

taxicab, they gave them my address, they come and say, hi, how are you, I'm coming here to discuss mediation, any time of the day, no appointment. What you going to do?

They used to do that at the university, and people would get frantic and say, Don't you give them appointments? And I say, I don't know them. They are not my clients. But in their imagination, I am their Miami reference, and they come to see me -- Nora, Nora. Then Nora has to have a face.

As long as they talk to me, they can go into any kind of mediation. They stand there and they say, this is my problem. And I say, okay, so and so, working with me will help you. And they say, well, we have a picture of you, and it's -- and then I point in the website where this picture is. Then they say, hello, okay, we can talk.

These are funny things, but you learn as you go that people need to hear a sense of connection -- who you are, where are you, where is your past, what do you know? It's less important that the way you connect and what can you offer to them in the sense of going beyond the dispute. The dispute is this, the relationship is this, and if you don't talk with them as to build up the trust in the relationship, nothing

happens. But this is country to whatever it can know about neutrality, so what do you do?

It's a funny secret. We go to this conference in the ADR field, and we have a beautiful conference in Phoenix, and I was talking with the local mediators there, the Chicano mediators, and they say, you know, whatever they are teaching at the university, we don't do that. And I say what do you do? Well, they were telling me what they do. And they do some different things that work for the Chicano community in El Paso, Texas, in San Antonio, in Phoenix and Tucson. And they know what they're doing, and it's different but it works.

So, our big challenge is how to put something that is logical and visible and has roots, into some kind of media that people can understand and follow through.

And the point that -- the last point I want to do is compliance. You don't think that because people sign an agreement that they are willing to comply with it if they are not into that wholeheartedly. I mean, it's not a formal procedure, it's not a logical procedure. They have established a connection and a relationship, and they will go through if this is in place. If no, if it's only a click on the web, they

will say, okay, click, and nothing happens afterwards. They are not committed to that.

So, it's very difficult for us, from here, to make a bridge and to understand how we can serve the needs of this population that is huge, is growing, is asking for help, without let's say falling into the temptation of opening something that is prepackaged here, because then we will have an awakening, and we will see when it doesn't work, what do we do now? And it's a wonderful opportunity that doesn't need to be squandered. We need to do it right from the beginning.

Thank you.

MR. STEVENSON: Thank you. Wendy Weinberg?

MS. WEINBERG: Sort of following up on those comments and some other things, as well, first -- oh, sorry, I think that it's useful when thinking about the types of disputes that are most amenable to ADR, to categorize them not necessarily by dollar amount but perhaps more generically. What I'm personally most comfortable with is looking at just disputes that involve the purchase and return of goods. It avoids a lot, and it doesn't even matter what the dollar amount is. I think that you don't have a lot of the other issues that people are concerned about in terms of

fairness and procedure and standards, because it's a much simpler transaction, which is not to say that there aren't any ancillary issues that I would be concerned with.

First let me say that NACAA is an association for government consumer protection agencies, so we have members who focus on primarily fraud but other consumer protection issues on the local, state, federal and international level.

So, even with the return of products, issues such as product safety come into play, and I would be particularly concerned that, aside from the fraud issues and other defects, that defects in the products themselves be reported to the Consumer Products Safety Commission or other governmental authorities so that other proceedings could go on concurrently with any ADR settlements.

MR. STEVENSON: So, are you saying that -- to look at the group of cases in terms of the purchase of products as a -- as an area where the claims might have a fair amount in common for purposes of handling them?

MS. WEINBERG: Right, as opposed to -- I mean, we have been talking about a lot of other claims, and I think the easiest examples had to do with the ebay where almost all of the transactions were -- concerned

purchases of goods. But when we start getting into family law or libel or slander or employment or harassment, there are so many other procedural and fairness issues that I'm not sure that ADR can substitute for the judicial process or can substitute for the face-to-face process.

MR. STEVENSON: What do you think of that, Nora? Does that make -- because obviously one of the challenges, I think, some of the comments made, about developing a sense of community on the internet and also the sort of cultural community connections on the internet, and obviously when you're buying a pair of shoes from Italy or Australia, it's a different proposition than maybe when you're entering into other kinds of relationships. Does that make sense to you?

MS. FEMENIA: How do you deal along the transaction with the customer? The other thing that I found that is very interesting is that in any dispute, commercial disputes especially, people expect some kind of recognition that something went wrong. Even if you don't accept guilt or blame or fraud, people expect in some way you're going to say, I'm sorry this happened, it was not our will, but we hurt you, and I think that even if you return a pair of shoes, a little letter that says, oh, we are sorry that we never complied with

your needs or requirements, is going to make the package complete.

This -- I can go on and on and on, but all the people are saying is we need to be treated with respect, and if you are a customer, what you want is that the other person or the seller doesn't put you into a track where you have only two choices. Even if you're not willing or you are not able to give the third choice because it's not in your stock, you have to acknowledge the needs for something different to what you have to offer, like, okay, sometimes some -- myself in my mind, I will say I will put -- you want choice A, choice B or do you want to vent, because the third choice is, okay, tell me your frustration, because I cannot offer you what you want. This is what I have. Well, make your pick. And they usually do, when I have said that I hear what they are needing, even when I can't fulfill that wish.

MR. STEVENSON: Okay. Alice Sullivan, do you have a comment?

MS. SULLIVAN: Yes, I think that we -- in looking at rules, I think it's very premature and I also think also perhaps a mistake to devise rules either by the amount dispute, by the user, whether it be the consumer or the business, or by the type,

whether it be a product safety issue. I think that we need to look ahead at the technology and what it's going to make available to us in the way of choices, choices that we presently don't have.

And I have mediated over a thousand cases, and most of those are in the face-to-face environment, and I've done a few in the online environment, and I think we can look ahead, for example, to videoconferencing and web conferencing that will give us the ability to have parties in sort of a virtual face to face, so they can have some personal interaction. It isn't the same in quality, perhaps, as being in the same room, but it may bring many of the same benefits.

We also, in doing online mediation in one particular case, I used a lot of e-mail, but at some point I thought it would be useful to get a little human connection and have the parties speak in a telephone conference call all as an adjunct. So, I think there are many evolving, hybrid models.

Another is an example of people who come and they start a mediation and they get to a point where they want some evaluation. They don't want to continue the discussion. They have reached impasse, and they may decide they will want to look to the virtual jury notion to get an idea of what do other people think.

Let's just ask these two questions.

And there are businesses out there who are providing these kinds of services. So, I think we are going to have many, many more choices, and the technology has also made it possible for consumers to be much, much better informed. You know, they can go to chat rooms, they can ask questions, they can get information on providers and on services in a much, much easier way than they can I think in the offline world.

MR. STEVENSON: Okay. How should one be looking at what one does if you get some kind of decision or -- I guess this would be mostly in the case of arbitration, but conceivably in mediation, in terms of enforcing the end result that you get? You get the end result. What do you do with that and how should we be thinking about that in connection with ADR in these small claims contexts generally?

MS. SULLIVAN: Well, I would think one of the recalls or one of the things we need to address is we have a good enforcement mechanism in place through treaties for enforcement of arbitration awards. We don't have similar mechanisms that I'm aware of in place for enforcing mediated agreements or contracts across international boundaries, and I think that's an

area where we do need to explore what the rules might be, and to achieve that, obviously it takes some international consensus, and that's where I think we might address procedural rules in the context of where are countries comfortable in enforcing each others' agreements or cross-border mediated contracts?

MR. STEVENSON: People have commented I know that the sort of option -- and I guess I'm focusing especially in the international context here, that trying to go to a small claims court where they are and then trying to enforce that somewhere else is just not a realistic proposition likely for a small consumer complaint. How about in enforcing arbitration decisions, does anyone have any thoughts on that?

MR. LEIGHTON. It's very expensive. If you're talking about low-ticket items, it's not going to be worth the candle in most cases, unless you have institutions doing it for the consumer or some sort of an insurance backup that would do it and then perhaps excise from the proceeding payment of attorneys' fees from the other side if they're wrong, but it may not be the kind of things -- it may be -- for what we're talking about, you know, it may be -- that's the Rolls Royce and we're talking Toyotas here.

It's not the kind of thing that's going to be

in everybody's garage, and I think we ought to work with the practical side first and try to resolve the great bulk of these things with very practical solutions and worry about the outlier cases, that would be international arbitration, Hague Convention and all this other stuff. Right now, we don't have in place the procedures to do that.

I think eventually something will come as the world gets closer and closer. I think we'll have unified procedures, but I think we have to -- I think we have to walk before we run.

MR. STEVENSON: Does anyone disagree with that proposition? John?

MR. BICKERMAN: Well, actually, I'd like to amplify something Richard suggested, which I'd never thought of but I think is a fascinating idea, and that's the idea of insurance. The concept behind insurance is aggregating risk, and here you have risk that, you know, someone may not be able to return a product, and again, I'm focusing on the multitude of the cases involving relatively small amounts, but the notion that one might be able to buy -- to purchase as part of your transaction, pay a small premium for an insurance policy, and then you would have a larger institution being able to prosecute these claims

against a company that either misbehaved or didn't perform, is a very, very compelling and interesting idea that I think is worth exploring.

But generally, I think Richard's right, I don't think that -- you know, we can have all the treaties in the world, but the ability to enforce an agreement, whether it's an arbital agreement or a mediation agreement that eventually gets certified by a court, is just something that is beyond the means of the average consumer.

MS. WELLBERY: I'd like to start with the proposition that you left us with, that we should be dealing with the bulk of the cases, just for purposes of spinning this dialogue out a little more, and I guess my question is is where does that take us? On the one hand, yesterday we heard that there is a greater rate of compliance with cases that are mediated than there is with cases that are arbitrated. On the other hand, we have also heard today and probably somewhat yesterday that there's some problems with doing mediation online, because you don't have the face to face, there may be cultural differences, which may be a greater issue in mediation and arbitration, and that's another issue.

So, if we are looking at the great bulk of the

cases, does that push us to either arbitration or mediation, and if not, where does it push us?

MR. LEIGHTON. Okay, I see this -- the internet is encapsulated in the words better faster. I mean, that's what -- you know, that's the object of it, and that's what's happening. We're all stuck in passing gear right now, and I see the situation pushing businesses, especially globally branded businesses, standing behind their brands more, avoiding disputes more, because they have to get better. They have to get faster. There's more competition. It's more worldwide. And I see more emphasis on what I'm broadly calling mediation.

I do mediation and arbitration, and "mediation" is a very loose word. Basically it's trying to get -- facilitate two parties to come to at least an acceptable -- everybody's third choice maybe. I see more effort along those lines and prefacilitation. I see people in businesses trying to solve the situation before facilitation, but by perhaps experts, customer representatives, people who can empathize.

It's really very important, people are learning this if they haven't known it before, and I think most major businesses know it, it is very important to say, oh, I'm sorry you had that experience. I'm not liable,

but I'm really sorry you had that experience, and really communicate that. And I see much more pressure there. And all of this stuff about seals and things like that, there's probably some -- there's even some backlash to that, saying I can handle this, you know, I can really handle this. I know my customers, and here's the way I want to do it.

And then to the extent that you need to go into those, I think the effort should be to avoid as much as possible arbitration, just as you would avoid as much as possible litigation, not that there's not a place for both, and there certainly is a place for both of them and a valuable place for both of them, but I see that's where the world is going.

On what I'm calling the low ticket items, most disputes, avoid them first, and then solve them at the lowest possible level, and I think broadly when you're talking about ADR, then you're doing that, and come up with ways for consumer representatives and others to resolve those really quickly on a nonfacilitated basis, and then go to the facilitator mostly in a mediation type setup.

MR. STEVENSON: John Welsh, what you think of that? Does that avoid arbitration? Does that appeal to you?

MR. WELSH: I had trouble hearing everything. I wanted to respond to something that John said about one-way arbitration, because it is something that we are doing more and more of very successfully in the employment area, and companies are coming in and saying, look, let's get an independent view. If an employee doesn't want to take it, that's fine, they can will go to court and do anything.

We have a number of consumer advocate groups here, and we set guidelines for consumer cases and said, look, if the consumer wants to go to small claims court, they should be able to go to small claims court. We think that is a process that works well. Now, we have the technology to centralize small claims courts, because there are companies that are disadvantaged by small claims court if they have a number of people going to small claims all over the country.

We have the ability now to centralize small claims court online and give the consumer -- and make it nonbinding, give the consumer swift action, but it's going to take -- and it's going to take the cooperation of the consumer groups who now have the ability to represent consumers on a centralized basis.

So, I would challenge the consumer advocates to try to find way to make this kind of process work to --

listen, consumers are not always right, you know, and -- I mean, we're making the assumption here that consumers redress and they are always right in what they are wanting, and a lot of times they're not. That's why it's a dispute. All companies are not bad, all consumers are not good, and I think that when we're dealing with the process and what we can now do, I think that we have to take that issue into consideration.

MR. STEVENSON: Let's follow up on something John said there, a centralized small claims court or an international small claims court. Could I ask Lorraine and then Robert Weissman to react to that?

MS. BRENNAN: I just had one comment that I wanted to make before about mediation. I think the statistics seem a little skewed, because remember, mediation doesn't always work. So, the fact that mediation agreements that work are complied with doesn't tell you about all the mediations that don't work. So, I think it's a bit unfair to compare arbitration awards and mediation awards, because by definition, in an arbitration, you always get an award, and in a mediation, it either fails or it goes forward. So, it is a bit of a misnomer to compare the two.

As far as a small claims court, I think one of

the things that's interesting in listening to this panel is we're all still talking about more business disputes. We're really not thinking about consumers, and if I buy a dress and it's not what I want, I don't need to talk to the CEO of Neiman Marcus to get my feelings soothed. I just want my money back. So, it's a very different kind of arena than, you know, what we're all used to in the arbital awards and the mediation arena. I think we have got to start thinking more on a smaller scale.

And as far as a small claims court goes, that's going to cause some real linguistic -- I mean, I like the idea, but I'm not really sure how it would work in the details. That's the problem. It's a good concept, but there's over 100 languages in the world, there are over, you know, 100 legal systems. It might be very difficult to administer something like that.

MR. WEISSMAN: Well, one comment first on the enforcement issue. We are generally quite critical of a variety of self-regulation schemes in this context, but there may be room for interesting kinds of self-regulation in the area of enforcement where different kinds of vendors and people who are at critical points in internet process are able to through contractual measures or certification measures or

others require internet businesses to abide by arbitration or other kinds of judgments against them or face sanctions that might be meaningful.

In terms of the international issue, we are not insensitive to some of the difficulties that arise to businesses in trying to deal with dozens or hundreds of different jurisdictions and different rules. On balance, our sense is that that's a cost of doing business, and if businesses don't like it, they should adjust to it, but we are not unwilling to consider different kinds of international rules.

I think we're a long way from knowing exactly what those would look like, and what we can think about more is what kind of procedures we would want or what process we would want to get there. And there are a variety of models of what we wouldn't like. For example, wouldn't want this to be done in conjunction with the World Trade Organization, but one could think to different kinds of international organizations, for example, the WHO or the ILO that represent health interests and are accountable to governments, or the ILO which represents labor interests and is accountable to governments, and have a kind of consumer protection organization accountable to governments but has as its basic mission the protection of consumers rights. And

even though consumers may not always be right, we would still want the orientation of the process to be protecting consumer rights.

MR. STEVENSON: Brenda Pomerance, I think if memory serves that you had a comment about enforcement in the comment that you filed. What's your take on that?

MS. POMERANCE: I'd like to thank FTC and Commerce for the opportunity to contribute, and Online Disputes Model, because most people don't know about it, is a fully automated system for small economic value e-commerce disputes. The system uses artificial intelligence to act as a negotiation assistant, helping out in the emotional venting as well as expectation-setting aspects of dispute resolution. Our system allows member businesses to specify dispute handling rules, so when the system detects that a dispute matches the rules, the consumer can get an immediate response from the business.

The system also records performance using reputation as an enforcement mechanism, and this also assists other consumers to avoid disputes with businesses that have bad reputations. We believe that the internet offers a tremendous opportunity to publicize how people actually behave, and this will act

as an enforcement mechanism on their behavior.

And we have four specific suggestions for government role. First, the government can establish performance metrics for dispute resolution systems so consumers can compare them more easily. Second, the government can encourage dispute resolution providers to publish anonymous case summaries which will help bring light into an otherwise opaque market and encourage participants to share their experiences with the community.

Third, the government can incent businesses to use dispute resolution systems by providing, for example, the statutory presumption of good faith for the businesses that use these dispute resolution systems. Fourth, for educational purposes, the government can take advantage of the nature of the internet by requiring that anybody who serves a lot of webpages daily can randomly insert public service announcement pages into the material that they're serving.

And we think that as far as enforcement goes, that just the public nature of the internet offers tremendous opportunities here, and we should be looking at that in trying to figure out how to utilize that most effectively.

MR. STEVENSON: Thank you. Dawn Friedkin?

MS. FRIEDKIN: I have had many thoughts throughout -- sorry.

I have had many thoughts throughout, but they keep getting taken away by other smart people around the table, but I would like to thank Robert for giving me the great introduction as an international organization and an organization that is already working in the area of alternative dispute hosting a workshop this fall that I hope all of you will make it to in the Hague.

But I kind of jump in here in an effort to synthesize some of the thoughts that have been mentioned already and also deal with the fact from the view of the work of an international organization, the work you're doing here is very meaningful to us, but I do request that exactly what Robert said is we are steps away from coming up with international agreement on how to handle disputes online in the sense of what parts of ADR work and might not work for different types of disputes, but what we do need you to do is think through the process to get there and ways we can reach consensus on things, which is what you're here doing today, but I really encourage the continuation of that, because governments need that from -- they need

the education from the private sector in a way to reach out to their intergovernmental partners to reach consensus and figure this out.

That was the process we used in developing the OECD Guidelines for Consumer Protection, and we need that continued support and help if we're ever going to get there. So, I kind of make this more of an urgence of let's continue to talk about what the steps are to get there and keep knocking away at each step as it comes.

MR. STEVENSON: Thank you. Let's turn now to a question we probably won't get the answer to before noon today, which is what substantive rules should apply to ADR? Or maybe there are some people who think we will solve it all, but it is an issue that comes up. What are the rules of decision? What rules would you apply in making a decision? And it may be that when the dispute is purely a -- really a factual one, that this issue is downplayed somewhat, but obviously there's some cases where that not be the case.

What are some of the choices of the rules of decision to apply in ADR? Alice Sullivan?

MS. SULLIVAN: Well, one of the obvious ones that occurs to me, being a retired judge, is the substantive rules from court in terms of, for example,

in a contract, what are the legal rules on offer and acceptance and the interpretation of contract language, is in looking to case law, but our interpretation of case law obviously in one state or in the national government is not necessarily going to be the same as the rules in the other countries.

So, I think I would devise, if I could devise the rules, I would give consumers and users a choice of rules on a website. I might give them any number of different ways they could do it and describe, for example, on the website maybe three different choices, A, B or model of which kind of rules would you like to adopt and see if the parties can agree and let them choose their own method, much as they do in mediation, and that's one of the real benefits of mediation, is giving people more opportunities and options than they get by following just strict legal rules. And they often will craft a settlement terms that are completely outside the scope of what the rules would allow. So, I would encourage rules that give them as many choices as possible to fit their own needs and interests.

MR. STEVENSON: Nora, what do you think of that?

MS. FEMENIA: I have another suggestion. As people already know, there is a lot of negotiation

going on permanently in the areas of regional treaties. You remember Melkasore (phonetic) or the Onvian Pact (phonetic), and the FTAA in Spanish Arga (phonetic) is having several negotiating groups. One of those groups is conflict resolution rules that are being agreed internationally. Of course, it takes a lot of work, but there are some decisions made, and they are dealing especially with intellectual property rules, services, what can you offer from one country to the other, investment, but also trade. Everything that is traded between countries in Latin America is being discussed at this level, and they are coming up with rules that are accepted by thirty-something governments.

So, I think that is a nice precedent that we can begin to use to see how they are coming up with rules that have value for everyone involved.

MR. STEVENSON: John Welsh?

MR. WELSH: Yeah, we're in the process of convening a group of academics and lawyers who practice in the international field to help us think through this problem of whose law applies. It's a very difficult issue when you are entering this field and thinking about it.

I went on the website for WIPO, the World Intellectual Property Organization, to get their rules,

and I thought, now, there's a group that would have really thought this through and it would be helpful, and their arbitration rules provide that unless the parties agree, the arbitrator shall select the choice of law. So, they punted on whose law applies.

And I think that within the United States, we're looking at whether we can use the Uniform Acts as a basis for it, because there are differences among states. I think that within the next ten years, we may see a kind of uniform internet law, which is based on the old custom and practice having to do with sales and contracts, emerge as the basis and the standard for arbitrations where the parties don't agree.

MR. STEVENSON: What are the practical issues involved in the sort of choice of law from the arbitrator's point of view? I know it has come up in connection with sort of just the application of foreign law by one court applying foreign law of another place. Is that an issue that then the arbitrators do -- is that something that is encountered now in the commercial context?

MR. WELSH: I don't think it is in the consumer. I think in the consumer issues which -- by the way, I have always assumed that the discussion that we're having today is after customer service, after

somebody has tried to redress, you know, on a return, and even used credit cards, that all of this is way down that road of after there have been complaints made to the company.

I think that you do get into enormous choice of law issues where it matters, where the outcome will be determined by whose law applies, but only in larger commercial kinds of transactions.

May I make one -- I wanted to -- as the FTC and the Department of Commerce looks at these things, I think that you really have to differentiate collection cases from disputes having to do with consumers, because I know that that's a whole other issue, is whether or not companies are using ADR to collect debts and how appropriate that is and what -- I think that's a separate topic than disputes that arise as a result of commerce.

MS. WELLBERY: You just said something that I thought was interesting, and that was it's not clear to you that for the smaller transactions or maybe the sale of goods or services that we need to reach the question of what law we should apply, and that's of particular interest to us, because one of the reasons the Department of Commerce is interested in ADR is because it may provide for us a way around the difficult

jurisdictional issues that are raised by electronic commerce. So, I'd like to pursue that thinking a little bit and see whether there's agreement with that or not.

MR. BICKERMAN: I think that's wrong, actually. I was -- in fact, I think it does matter which legal system you're in. I was speaking in Jordan last month, and much to my surprise, Jordan actually follows two systems of law. It has the Anglo-American systems of law, case precedent, and it also has the Napoleanic Code as a result of Egypt having been controlled by the French for a short period of time, and Jordan drew some of its laws from Egypt.

And take a simple case like an auto accident. Now, we're not talking about purchase and sales, but auto accidents are, you know, pretty run of the mill, simple disputes as they go, but in Jordan, the judge, if he decided to follow one set of rules, would rule one way, and if he decided to follow the Napoleonic Code, could award an entirely different award.

So, I think once we cross borders, we have a very difficult issue that can't be underestimated, and I think that it suggests two things to me. One is I think we do need to engage in international discussions to try to develop an accepted system of laws for simple

commerce, and again, this panel seems to focusing on the purchase and sale of consumer goods, and we put aside the larger transactions and different types of cases.

But the second point, too, is I think that -- and this goes to another issue that I don't know that we'll get to, is whether the proceedings should be confidential or not. I think it's real important that they not be confidential. If we are going to follow arbital -- if arbitration is going to play a role in the resolution of these disputes, beginning to develop a case law of international disputes online will help us develop what the law should be, and it may also guide the international discussions that we're going to be having.

I don't think that ADR is the way out of this problem. I don't think it's a quick, easy answer. I think we're going to have to confront the difficult challenges of developing a set of standards, substantive standards, that will control these type of disputes.

MR. STEVENSON: Well, let's -- actually, maybe if people have a reaction to that last point, and then we will move on to the confidentiality question, which I think is an interesting one.

Robert, did you have a reaction to that issue?

MR. WEISSMAN: Well, just quickly on the choice of law issue, our view is that there has to be -- the consumer cannot be required to waive home court jurisdiction prior to the dispute. We're seeing that happening through -- at least trying to happen, on behalf of businesses, through contract --

MR. STEVENSON: Would you say -- I'm sorry to interrupt. Would you say that that also would apply to an ADR process, even a voluntary ADR process, there couldn't be different rules that applied there?

MR. WEISSMAN: Yes, not prior to the dispute. Once the dispute occurs, I mean, you have this model of choosing the options. That's when you have a dispute, not when you -- I hope not -- when you buy the product. That's not what people are going to be thinking about.

And I think the various contracts of adhesion that are going on or the proposals for certification schemes or different things that are going on, The Hague Convention or the U.S. position on jurisdiction are all disturbing. The basic principles should be in the absence of an international, uniform rule or set of rules, the home court of the consumer -- the home court rules of the consumer should apply until the consumer makes a knowing waiver of that at the point of dispute.

MR. STEVENSON: Richard Leighton?

MR. LEIGHTON. Yeah, on the choice of law question, I think it might be helpful to divide it into two, the choice of law for the decision-making and the choice of law for enforcement of the decision, which sometimes are two different things. The -- sorry.

I was saying that the choice of law can be in these types of situations two different things, choice of law for the decision, how the arbitrator if it's -- and it will be an arbitrator in this type of a situation, will decide a case based upon what kind of precedent, and then how it's enforced -- you can divide them in two -- and where are you going to enforce it?

I see developing, because of the internet, certain principles that businesses have been adopting. In effect, they can choose their own law and say, you know, I'll be bound by this. You don't have to bind the consumer, but I'll be bound by certain principles, and you say I'll be bound by certain decisions, this sort of thing, and you don't even have to bind the consumer in those situations, and I see it developing into worldwide a certain set of principles on transactions, offers to sell, acceptances and things like that, and I don't think this is very complicated.

I think almost worldwide there are universal

principles here that can be found, and at the very least, those could be part of an ADR system that will help this get this done quicker, which I think from a business point of view is what the business people want.

MR. STEVENSON: Okay.

Wendy, we'll give you the last word on this issue and then we'll turn to the disclosure and confidentiality issue.

MS. WEINBERG: I just wanted to respond very quickly to Alice Sullivan's suggestion that there be a choice given to the consumer and the business at the beginning of the proceeding. On the one hand it's sort of appealing, because it's consumer choice. On the other hand, it assumes a tremendous amount of sophistication on the part of the consumer, which I don't think is fair. I don't think we can assume that.

I don't think we can assume that most of the consumers are going to be represented, and if somebody's given the choice between, you know, common law and Napoleonic Code, they are going to say, gee, I like B, B is between A and C, sure, why not, and for them to understand the ramifications of that decision I think would be quite difficult.

MR. STEVENSON: Okay, thank you. Well, let's

turn to the point that I think both Brenda and John Bickerman raised of the confidentiality versus disclosure and how that impacts on the ADR process, and it seems to me that the question of how sort of visible this should be will vary depending on exactly what information you're talking about.

And so I guess maybe we could start with what information is it important to maintain confidentiality about, what information in your view is it important to disclose?

Brenda?

MS. POMERANCE: Well, if we look at securities markets, securities markets are very price-efficient and they tend to get a lot of trust when the market data is reported, and what's reported is the price and the quantity that was sold, and similarly, we can come up with statistics which preserve the anonymity of a particular consumer, but let the process as a whole be examined.

And so some statistical -- I mean, there are a lot of people here who have an interest in this and would like to participate in defining what these statistics are. Good examples are cost to initiate a transaction, average cost of settling the transaction, percent of transactions that are settled through the

system, percent that are not settled, percent that are sort of in this gray area in between.

And in order to have this kind of market, we first have to decide what the transaction is. I would agree with your point that general consumer transactions where you purchase goods, whether they be physical goods or software downloading, and then have to return them, those are very amenable to this kind of record keeping, statistics keeping. More personal things, such as divorces or something, might not be so amenable to this.

But if we can define market segments and monitor them and make them open, I think we will be going a long way towards helping educate consumers about the fact that it is okay to have disputes.

MR. STEVENSON: Okay, does anyone disagree with that proposition?

Richard?

MR. LEIGHTON. I disagree slightly. I think you have to take into consideration the process here. From a business point of view, many businesses are going to at a certain level just say give the consumer what she wants, even though she's wrong. And to the extent that this becomes a public practice, that will inhibit that type of approach.

And first of all, if both parties want it to be confidential, I think that it should stay confidential. I don't think anyone should impose on this type of process some sort of publicity factor, even a general one. If it's general but you name the business or the location, it's not so general anymore.

I would say in adjudications, it might be helpful to have some precedent, but I'm not sure how valuable that will be. I don't think it's going to be that much more valuable than just straight contract law in court cases and things like that.

Again, in adjudications, you very often have a situation where one party, in effect, settles and gives up on the situation, and to the extent that you publish that, you may cause people to fight harder in adjudications than they normally would.

But particularly at the lower end of things, where you're trying to negotiate or mediate a settlement, I think we'd have to look long and hard -- I wouldn't say you would be against it, but I think you would have to look long and hard against publicizing this whole thing. You may end up generating more complaints you normally would have. I'm not sure how valuable that would be.

The other side of that coin is that people may

not be aware that they have complaint rights, and therefore that would help them, but I think it's a more difficult question than it appears just on surface.

MR. STEVENSON: Brenda?

MS. POMERANCE: I think we need to give consumers perhaps a little more credit than we have been. These are consumers who have managed to get onto the internet, who have managed to complete a transaction in some manner, and so I think that we should have some confidence in their ability to sort through information if it's presented to them clearly.

Perhaps it's unreasonable to make them run after information and go run into chat rooms and send instant messages to their buddies and so on, but if there are readily available, public statistics for them to look at, I think they can make informed decisions.

MR. STEVENSON: Okay. Dawn, in preparing for the workshop that you'd mentioned, has this issue come up in terms of perspectives of other countries? Has it been an issue?

MS. FRIEDKIN: Not that I recollect at this point, but it's probably too early to determine.

MR. STEVENSON: Well, you were kind enough to answer my question, so go ahead and make your comments.

MS. FRIEDKIN: I think my comment is probably

somewhere in the we're getting to this point, but I think it was something worthy of talking about, at least -- I'm sorry.

I think my comment, we're getting to this subject, so I thought I'd kind of get us there, and we can talk about it at the same time as the issues we're talking about now. It's something that, Hugh, you may want to talk about even more, but as we talk about confidentiality and we talk about reporting of cases and information, one important aspect of this is the availability of this information to governmental agencies and enforcement agencies.

In some way, I know at least from the Federal Trade Commission, their ability to follow up on cross-border fraud and issues like that have been because they have access to complaints and have been able to compare with other countries complaints and issues that have arisen, and I just think that's an important thing to keep into this context, as well, that it may not be something that gets posted on some website somewhere or reported in a book, but it somehow has to make its way for valuable and fruitful, meaningful enforcement.

MR. STEVENSON: Richard, what do you think of that distinction, that there may be some information

that could be shared with law enforcement, maybe not necessarily -- your answer may be different?

MR. LEIGHTON. It's a valid distinction that exists right now and, you know, and in a more formal proceeding, there is discovery that can be had by a governmental agency. My fear is we're in a new, better, faster world right now, and I think the object is to get the consumer satisfaction as quickly as possible, and from -- starting with reputable companies.

The fraudulent companies, I think that's a whole different situation. Reputable -- and you're going to have trouble no matter what, but I wouldn't -- and they are a minority. I wouldn't want to do anything that would inhibit what I perceive as the movement of reputable companies to be more forthcoming in this. In fact, the movement of government, the FTC and the Department of Commerce and the international organizations. It used to be government was viewed as, you know, you only had one light, and that thing was red. Now we're seeing not only yellow but green, you know, and saying, come on, you know, that type of a thing.

So, this is a difference that's going on, and you'd be surprised at some of the situations where I've

been in litigation and then as soon as it's over, I can count on two or three -- depending on what it is, I can count on two or three consumer class actions in California, where we get a letter and it says we will go away for $20,000 or $40,000, and the client's got to look at that. We'll win. It will cost $300,000, we'll win, but I mean that's the kind of stuff that goes through a business person's mind.

And what I see, especially for globally branded companies, is the urge to do a better job at consumer satisfaction and quicker, and I just say let's think it through before assuming that certain things are true. They may be true in some contexts but may not be true in another.

MR. STEVENSON: To follow up on Dawn's point, is there anyone that disagrees with there being at least some value to providing this kind of information to government enforcement? And I ask that question not, to be honest, entirely as a disinterested moderator but as an unabashed partisan of the value, at least from our point of view in law enforcement, of being able to see what is happening in the marketplace. Somebody raised that.

Brenda?

MS. FEMENIA: I would like to add something. I

think the internet is the big equalizer in the sense that it can provide people the elements to educate themselves, and construction of the educated consumer is, let's say, developed in the sense that it's something taken for granted here. I don't see that happening as easily in Latin American countries.

What I see is that now there is a strong trend towards what they call civil society. A civil society development has been pushed by the banks putting some money into this effort. It means basically that people are taught what are their rights as individuals and as consumers, but this is an educational way of beginning to construct the idea, so customers then see themselves as having the right to be treated fairly by a company they're doing business with.

It takes some time, and even them now, even you say the words, people are weary of believing that those rights that are predicated are going to be executed in practice. So, it's a wait and see attitude.

And I would say that companies need to send a message, strong, clear and persistently, that they will go through with the promises of treating the consumer fairly so the consumer is, again, beginning to feel that he or she has the rights that are real, and in that sense education through looking at what happened

with other cases is basic.

In my model, I was let's say clearly thinking, okay, we can put side A and side B and at least what is the framing that online mediation will provide to this dispute, it's educational for the rest of the people that don't know how to process a dispute, nonetheless how to process a dispute through internet. So, the educational part of it is very strong, and I think we have to pursue that.

MR. STEVENSON: Thank you.

John Welsh?

MR. WELSH: Yeah, I --

MR. STEVENSON: Give you a quick last word, then we can take a couple questions from the audience if there are people who have them.

MR. WELSH: Yeah, I don't think anybody should be muzzled, if that's what confidentiality means. I would leave it up to the consumer in consumer cases. If the consumer wants it confidential, let it be confidential. If they say no, no.

MR. STEVENSON: Okay. On that, why don't we see if there are people who have questions. We've got one right over here, if you can identify yourself, please.

MR. RICHESON: Ken Richeson from the Center for

Strategic and International Studies.

One thing that has -- that I have a concern about from the panel is that we tend to treat all businesses as the same. The promise of the e-commerce is really for small and medium-sized enterprises to expand their businesses through use of the internet, yet we're talking a lot about large companies who have well-recognized brands, who have well-developed consumer relations departments, have an interest in keeping and maintaining satisfied customers and not losing them, because it's more difficult to find new customers than to retain existing customers.

A lot of what we need to do, though, is recognize that in the business stakeholder arena, there are two stakeholders, the larger companies and the small and medium enterprise companies, and they have a need to make sure that customer complaints don't get in the way of their being able to do business, and ADR provides an opportunity for them to resolve those without a whole lot of commitment of internal resources.

I'd like to have the panel's ideas in terms of whether or not ADR does provide, at least as I had suggested, that kind of an opportunity for small and medium enterprises, and shouldn't we be looking at it

from that perspective?

MR. STEVENSON: Do people have thoughts on that?

Brenda?

MS. POMERANCE: My thought on that is that in many cases there are going to be a few small businesses that are generating many complaints, and a possible role by which we can stop these people from evading review is that the government will work with the dispute resolution systems to tell us when we need to report to them when businesses are simply refusing to participate in any form of dispute resolution, and then government can aggregate this and see if there are certain businesses that are generating a lot of complaints, not answering them, and government can step in and perhaps correct this problem.

MR. STEVENSON: Anybody else like to respond to that?

Richard?

MR. LEIGHTON. There are all sorts of sizes of companies, some with one person and some with hundreds of thousands, but we're talking about the internet here. If you're a large, efficient company, you're going to use the internet, and you're going to use it more and more and more. It's like you can't take a

telephone away from them. They're just going to have more telephones. So, the medium is really the message that we're talking about here.

There are different needs. I can see a need for ADR for both sides, and the smaller the company, the more the need for some sort of independent ADR source, a neutral or a service if you get out there. Many of the companies that make presentations here and that are in this field are not in there primarily or exclusively at least for resolving internet-created disputes. They're using the medium as a new way to handle other kinds of disputes, court cases and things like that, often very effectively.

I think we have to view this as the new automobile, you know, it's going to have uses for everybody, and some of them will be tailored, but some of them will be the same. As a concept, ADR would fit for a large company as well as a small company, and for a small company, you'd probably perhaps want to use more ADR than customer satisfaction, just because you didn't have the manpower, but you may have your own people in what I'll call loosely ADR, because ADR is going to change now.

It's really dispute resolution, and it's probably even the wrong word to use it, but I mean you

are going to have like a Dell. Anybody that's had a computer and had a problem with it, you call Dell, they spoke yesterday, they're wonderful. I mean, they'll get you customer service. We had a problem, and I recommended Dell to three people, and, you know, that's how it worked.

Now, that's all their internal people, I assume. I don't know who they -- I don't know who I was talking to, but they're very well trained. A big company can do that.

Smaller companies are going to have to find some independent sources for help, customer satisfaction perhaps. With the internet, it's just not like you're going door to door anymore. You're offering yourself if not to the country, to the world, and you get a tremendous response, and you have to do something. You have to handle that somehow.

Having gone on the internet, you suffer the consequences of it, and you're going to have to handle these or die, and ADR is one of the best ways to do that. Certainly litigation is not the way if you're small.

MR. STEVENSON: Thanks. We'll take two more quick questions, and then I think we'll take a break.

MR. GOLDMAN: Thank you, Charles Goldman from

Mediation Arbitration Resolution Services.

This panel has considered important questions, the rules of procedure, choice of law, confidentiality and law enforcement. I'd like to ask the panel what they think of the notion of seal organizations providing a brand, especially to small and medium-sized companies operating on the internet whose brand names may not be well known to consumers or may not be known outside of their traditional trading areas, who might be able to codify the rules, the choice of laws and ultimately perhaps have a role in interfacing with law enforcement while maintaining the confidentiality for individual disputes.

MR. STEVENSON: Any thoughts on that?

MS. POMERANCE: We asked about 200 small businesses who operate on the internet exactly that question, would you find a seal valuable, and we were fairly surprised, because we got a huge range of responses. Some businesses said, sure, we'd love to have a seal. Other businesses said absolutely not, it would insult our ability to handle customers. And then there were businesses in between that said maybe, not sure.

So, as far as seals -- and that's for a well-recognized seal. If we have several institutions,

several companies all providing different seals, it's just going to be terribly confusing to the consumer, and there's no reason to stop this kind of thing, but simply relying on a seal and assuming everyone is going to jump on the bandwagon is just very unrealistic, and that's what these businesses told us.

MR. STEVENSON: Thanks.

One last question?

NEW SPEAKER: Yes, I would just like --

MR. DONAHEY: Scott Donahey from Palo Alto, California.

I would like to address the applicable law question, and my question is this: You know, arbitration has been used for thousands of years to settle international commercial disputes, and in the course of its use, it's developed the concept of lex mergatoria or the law merchant, and that is general principles of law that are common to all legal systems in the area of commerce, and when I say all legal systems, I include not only common law and civil law but also Muslim or religious law, the Shariah, and those principles are basic principles, principles such as if a party makes a contract, the party is bound to honor the contract, and if a party breaches a contract, then the party must answer in damages.

It seems to me that this concept of lex mergatoria, which has been applied in this century in sophisticated disputes by international arbitrators to such sophisticated disputes as concession agreements for petroleum, it certainly is applicable and understandable to consumers in the internet area, and I'm wondering why do we need to choose another law? Why can't we stick with something like the lex mergatoria, which are just general principles?

MR. STEVENSON: Maybe in a way it's fitting to end with that question, also we're running out of time, so I think we will give our questioner the last word and think about that as a question that we can return to, and I think it will actually come up in later panels.

I'd like to thank this panel very much for their contributions. It's been very helpful.

(Applause.)

MR. STEVENSON: We are going to take a break now and then we will return at quarter of 11:00.

(A brief recess was taken.)

MS. WELLBERY: I'd like to welcome you back to our next panel. This panel will discuss issues that affect the intersection between alternative dispute resolution and judicial dispute resolution. We are

going to consider questions such as whether alternative dispute resolution should be binding on the consumer and/or on the business and whether it should be or can be required as a prerequisite to litigation, and I think these are somewhat controversial issues and I think we will have a very interesting panel.

But before we begin these discussions, I would like to introduce Diana Wallis, who is a member of the European Parliament, who's come a long way to participate in this workshop, and she's going to make some introductory remarks. Diana serves on the Parliament's Committee on Legal Affairs in the Internal Market, and so they, too, are looking at this issue from the European perspective. Before being elected to parliament in 1999, Diana worked as a solicitor in the UK and specialized in commercial litigation.

Diana?

MS. WALLIS: Thank you very much, Barbara.

I must say I feel a little strange being here, because I guess I'm probably the only elected politician amongst the speakers, but I notice I've been given slots with all the lawyers, so I guess that may emphasize my past professional life and be an attempt to neutralize any two political statements from me, but whether as a lawyer or a politician, I have to say I'm

really excited to be here. I've enjoyed the first day, yesterday, of this workshop very much.

I have found my dialogues here with colleagues, because I came to Washington before Christmas, very helpful in informing our debates in Europe, and I hope that we are going to be able to continue that, also ensuring that we think globally.

In introducing this panel, I want to concentrate on the borderless aspect of the title of the workshop, because I believe that's where the European experience probably has much to offer, because not only do we have to cope with 15 member states each with their own legal cultures and traditions and 11 languages, but perhaps more importantly, because the whole European adventure has been about creating a single or internal market without borders.

Over the last years, Europe has spent its whole time engaged in dismantling all forms of barriers to trade, and equally, amongst dismantling barriers to trade, we have been trying to ensure an equality of access for our consumers and businesses to justice. So, that within the terms of the internal market is just another barrier we have had to confront.

Now, I guess as with all politicians, before I was elected, people used to ask me the normal question,

well, what do you want to achieve? And I guess they expect the normal sorts of answers, something about funding for healthcare or schools or education, but the answer I used to give which used to produce some rather odd or glazed expressions on faces was that I want to do something about access to justice.

So, it's a bit like the story that James Burchetta told yesterday from CyberSettle. I had seen in my professional life so much of the realities of trying to make the legal system work for our citizens, and in my case, in relation to cross-border disputes in Europe.

Now, this despite the fact that within Europe, we have a quite sophisticated system known as the Brussels Convention on Jurisdiction and Justice that actually attempts to facilitate the application of jurisdiction between parties in civil and commercial matters and allows more easier recognition of each state's judgments in the other state.

But even so, I would have to confess as a lawyer that I spent a good deal of clients' time and of their money arguing about which member state disputes were going to be dealt with in, and if we ever got over the hurdle of where the case was to be litigated, then we had to deal with having legal interpreters in court,

whose law would apply, and you know, if you want to apply another member state's law in England, you actually have to prove that law as a fact subject to cross examination.

So, I tell you, litigating across borders, even with the European Union, is not for the faint-hearted, and it's certainly not for the average consumer. So, if that's what happens with a single market, how much bigger is the challenge that faces us in relation now to e-commerce in a global marketed?

Of course, the way things happen in life, coincidentally, as I arrived in the Parliament, what did I find but that the Brussels Convention was being reviewed, and some of my rather kind colleagues thought that I might be a useful sort of person to compile the Parliament's views on this and act as reporter. So, within this review, I have managed to get the challenge that I set myself before being elected, to try and improve access to justice.

Now, you might think in a single market that has had a consistent program of approximation and harmonization of law, that the problems would be less, but Europe has always stopped short of actually harmonizing what we can call the core elements of private civil law, tort and contract law, except for

the few notable exceptions like product liability.

Now, it may be that greater harmonization within the European Union will follow, but for the moment, traders and consumers both have the prospect of dealing with 15 different EU jurisdictions. So, our problems with the advent of e-commerce are in a way a small mirror image of the larger global problems.

Now, it had appeared to me and, indeed, many of my colleagues that ADR offered the best prospect to avoid these choices about whose jurisdiction and to provide a more efficient and accessible low-cost forum for settling disputes, but I think we need to take a very focused approach. We do need to be very clear about what we are attempting to do here, because what we are not attempting to do is to create another legal system.

One colleague of mine suggested that what we might be witnessing, because of the way we are dealing with this by self-regulation or with some self-regulatory aspects, is no less than the privatization of our legal systems. I want to make it clear that I don't think that's the case.

Our legal systems in Europe will remain in place, with all their paraphernalia, their rituals, their procedures. It may be over time we will have

greater convergence, but what we have to focus on is creating something quite different. We don't want to create another monster with all the procedures, the formality, the things that we've been trying to get away from with alternative disputes.

I think what ADR offers to us is firstly a two-fold promise. Firstly, to render business more service-oriented and competitive, and secondly, to increase consumer access to redress and justice; more importantly, to act as a filter.

Now, I want to try and explain what I mean by a filter system. I foresee a kind of hierarchy. First of all, the trader will have in place their own system of what was yesterday called dispute avoidance, dispute avoidance procedures, part of good business and good service. Then the trader, as a second part in the hierarchy, will adhere to an independent, external, accredited ADR system. It may be that there will be different systems in different sectors; it may be that one size doesn't fit all. And I would tend to agree with that, but there will have to be some basic principles. And lastly in the hierarchy, there must still be access and availability to the courts as a last resort, but this is a final option in my view, but a final option that should always be available to the

consumer.

I just want to end with one thought, because within the debate in Europe, we have had many who have tried to conjure up the picture of businesses and particularly SMEs to whom e-commerce offers so much promise, that they will be facing litigation in 15 or more jurisdictions. Now, if this was really to be the case, either on the first hand, the business would probably be doing something to attract that sort of litigation, or secondly, it would mean that we had an image of consumers that's something like an army of what we in England would call vexatious litigants just waiting there to attack the unsuspecting the web trader the minute his site comes online. I doubt that. I doubt it very much.

It seems to me that most businesses and consumers want access to some sort of redress system that is simple and low cost, and if we can give them that on a global scale, leaving the courts as a last resort, we shall together have delivered much to our citizens and to our respective economies.

MS. WELLBERY: Thank you very much.

(Applause.)

MS. WELLBERY: I think Diana just gave us a fair amount to think about, and I will introduce the

panelists, and then we can start.

To my immediate left is Edward Anderson, Ed Anderson, who is the managing director of the National Arbitration Forum. And to his left is Paul Bland, staff attorney for the Trial Lawyers for Public Justice. To his left is Susan Grant, vice president, public policy, National Consumers League.

Eric Mogilnicki, a partner at Wilmer, Cutler & Pickering. Ron Plesser, a partner at Piper, Marbury, Rudnick & Wolfe. Steve Sakamoto-Wengel is to Ron's left, and he is the Assistant Attorney General for the State of Maryland.

And then we have John Vail, who's senior counsel for constitutional litigation at the American Trial Lawyers Association. Diana Wallis, as you all now know. And Steven Ware, who's a professor of law at Stanford University, Cumberland school of law.

There was a lot left unstated I thought in what you said, Diana, and maybe some of these questions will tease out some of your views on these unstated points.

I guess I'd like to -- where I think it would be good for us to start is with the perspective of U.S. law and whether U.S. law permits binding arbitration for consumer contracts, and if so, under what circumstances, and if so, do we think that's a good

idea.

Does anybody want to offer their views?

Susan?

MS. GRANT: Not me.

MR. MOGILNICKI: I'll start.

MS. WELLBERY: Okay, thank you.

MR. MOGILNICKI: I'll start in part because there have been so few kind words said for binding, mandatory arbitration that I rush to its defense.

Two things I think are preliminary considerations. One is that this is a remarkable time in the development of the internet and of alternative dispute resolution, and for that reason, I think we should be hesitant to deny consumers and businesses any part of the spectrum that we've heard discussed today, the spectrum from mediation all the way to binding, mandatory arbitration.

And secondly, I think it's important when we talk about binding and mandatory arbitration to point out that it is nonetheless freely chosen. In other words, businesses offer consumers a product with or without arbitration, and consumers accept it. Arbitration is no more forced upon consumers than price is forced upon consumers. Consumers can go looking for another price or for another dispute resolution

mechanism. For all of these reasons in the United States, it is perfectly appropriate to have binding, mandatory arbitration.

When you look at binding, mandatory arbitration, think about its application in a wider global marketplace. I think we also have to keep in mind that the virtues of ADR are also the virtues of binding, mandatory arbitration, that indeed, in some ways, binding, mandatory arbitration partakes those virtues more than any other kind of ADR. Certainly a binding arbitration is faster than a system that requires the parties to go through two levels of dispute resolution, arbitration and the courts, and there's no doubt that it's faster than the courts alone.

Similarly, it's less expensive to have binding arbitration than to have a system where the parties, again, pay jointly through price -- through the price of the goods and services that are being purchased for both an arbitration system and for a litigation system. And interestingly, those costs are borne -- the costs of litigation are borne by consumers whether or not they want litigation.

In a world where there is no mandatory, binding arbitration, there's a subsidization of consumers who

are litigious by consumers who are not litigious and who would be perfectly willing to abide by the results of a binding arbitration. Binding arbitration offers the convenience and simplicity of a quick resolution with finality and without lawyers, which again partakes of the virtues of ADR in a way that other systems, lesser systems, do not.

And finally, I think the reason -- that we should know, as we do in other contexts, that a system with higher costs, with more levels, with more complexity, is always going to benefit the party with more resources, which in most online transactions is the business. And so we should regard an offer of binding, mandatory arbitration as a reasonable deal for a consumer, and we shouldn't do anything now, at this very early moment in the evolution of ADR and the internet, to deny consumers that choice along the spectrum of ADR opportunities.

MS. WELLBERY: Thanks.

Paul, did you want to respond?

MR. BLAND: At the risk of shocking him, I'll say that I do agree with Eric to this point: I think it's true that yes, in the United States right now, it is plainly legal to force consumers into binding, mandatory, predispute arbitration, and except for cases

where there's a very strong argument for the consumer that they didn't agree to the arbitration clause or that there's something particularly unfair about the arbitration clause that renders it unconscionable or something like that.

The question of policy, though, goes very different, goes very differently from my perspective, and I think that it's particularly relevant here, because whatever the rule is in the United States, which I think is what I just said, I think that you are going to see a very different rule for the global online environment.

The representatives of the European community and the European Union who have spoken at this conference and at prior meetings leading up to this have very strongly indicated that they are not going to go for a binding arbitration system that takes away people's rights to revert to court, and moreover, it's plainly rejected by that -- the e-commerce group that Mr. Plesser represents, if you look at their statement, it seems clear from their statement that they are envisioning that consumers will continue to go to court.

So, this sort of what I think is extremely unfair binding, predispute arbitration system that's

been foisted upon American consumers apparently isn't going to be foisted upon consumers in the rest of the world, which I think as an American is a somewhat depressing prospect.

Why do I think it's bad policy to have this kind of binding predispute arbitration? There's a host of reasons, but let me just talk about two of them quickly.

First, with respect to the argument that Eric made that well, it's all freely chosen, I think that depends a lot on what you mean by "freely chosen."

In other words, right now we have a general body of law in the United States that says that you can't give up a vital or important fundamental Constitutional right unless you do so with a particularly heightened level of consent. In other words, Constitutional rights are treated differently, they are treated differently and for good reasons, than other sorts of rights you might give up. So, a price term or all kinds of different provisions that can be in a contract, how many widgets, what they'll weigh, what color they'll be, that can all be in the fine print, and those sorts of contracts are enforced all the time, but you can't give away Constitutional rights to the fine print of a contract.

For example, yesterday Mr. Foskett talked about an ADR clause that was on page 9 of an 11-page agreement that he clicks on. Well, I don't think that anyone imagines that the American courts would uphold a clause on page 9 that says, you, by the way, promise to never, ever criticize anything to do with the Microsoft Corporation or something like that.

Now, you can give up your free speech rights in the United States if you knowingly do so in a contract. When people are fired, they regularly go and sign a contract that says, well, I promise never to criticize my employer again, that kind of thing, but as long as you know it's there and you really knew what you were getting into, but I'll tell you, no one is going to take away your free speech rights based on a clause that's on page 9 of an 11-page contract that's just thrown in there, and why should taking away people's rights to get their day in court and to a jury trial be different?

The point is that consumers pay very little attention to these clauses and don't know they're there half the time. For one thing, a lot of times they are communicated to consumers in ways that are pretty much designed, and a marketing expert could tell you that about 1 or 2 percent of them would ever get to that

page 9. And the other thing is even for consumers who see that, even if you put a little star next to it and put it on the first page, the truth is that at least ten panelists yesterday out of all those panelists yesterday said that most consumers don't focus on this issue in advance. The businesses do and the consumers don't. They're not paying attention to it on a predispute basis.

So, what you get is you get the vast majority of consumers find out that they have freely chosen Eric's arbitration clause when it lands on them once they have a dispute, and that's the first time they know about it.

So, that brings me to the second policy reason. Yesterday Mr. Underhill of the Better Business Bureau talked about how an angry consumer is a bad thing for a company, a seemingly common-sensical provision. Well, I think the one thing you're going to see is there's going to be a significant backlash from consumers who discover mandatory, binding, predispute arbitration provisions once they first have a dispute.

I can tell you that literally hundreds of these people have called my office looking for representation, and they are extremely angry. They are not happy to discover that someone is saying that they

had agreed to they give up the right to their day in court in a way that they had not known it before, and I think that businesses are going to find out that doing this kind of thing, well, yes, it's going to get them out of a lot of liability, maybe they'll beat some class actions, but I think they are going to develop the same kind of excellent public relations that the HMO industry has done with ERISA preemption. I think when they wipe away these lawsuits against them, a lot of people who have no meaningful remedy are going to be extremely unhappy.

MS. WELLBERY: Thank you.

Susan?

MS. GRANT: Thank you.

I didn't want to answer the question about whether or not it's legal to have mandatory, binding arbitration, because I'm not an attorney, but I think what we're really talking about, to pick up on what you said, is whether it's a good idea. What we're trying to achieve here is confidence for consumers in shopping online, and if we really want to do that, then I don't think that we want to have mandatory, binding arbitration of their disputes.

And let me ask a couple of questions: If we offer consumers great alternatives to court for

resolving their disputes, alternatives that are quick, that are easy to use, that are fair, then why would we need to force them to use them?

And, in fact, if we force consumers to use a particular ADR mechanism, then what incentive will there be for companies or others who are building these systems to build the most attractive systems to entice consumers to use them? I think, in fact, that there would be a disincentive and that it would be more likely that you would have biased systems which then leads to the question of what kind of rules do you have to have and I think results in needing to have far more complex and extensive rules than in a situation where it's simply an attractive option that consumers can choose to use or not.

MS. WELLBERY: Thank you.

Ron?

MR. PLESSER: I just wanted to clarify and make a couple of statements about the position at least of the group that I've been working with and I think what we think our result is. I think it's not right to say that we rejected mandatory arbitration, as Paul said. I think what we were doing is writing a global code that would apply globally, and I think we were trying to be realistic about the e-directive on unfair

contract terms and other things, but in writing the code, it is our hope that local jurisdictions will dialogue with us and will take the challenge of coming up and recognizing that there needs to be deference at some level to the activities on cyberlaw. Whether or not that's through the contract or through the concept I heard before, which sounded great, the guy from the International Arbitration talked about this kind of common elements of law.

I think we need some time to develop it. We did not include mandatory arbitration in our proposal because of its global application and because I don't think it's quite there yet, but we do call upon local regulatory authorities and consumer protection groups to continue to engage so that we can have a dialogue to create a workable framework for resolving disputes that arise from online transactions.

The one thing that we did do -- so, we certainly in having our code in ADR did not exhaust consumers' rights to go to court, and the consumer could go to court after the process, and emphasis on the word "after."

We do think, notwithstanding what Susan just said, that it is important to try to get these disputes into the corporation so they can resolve them and into

the independent ADR process so that they can be resolved before they go to court. If the company is going to go through the expense of doing it and the exposure of doing it, that we think it's appropriate at least to say that that's the first stop.

If the consumer, under our provision, is not satisfied, whatever rights they have will not be extinguished. And let me say there are some consumers that have a lot less rights. I mean, we always think about the U.S. or the European consumers. There may be some consumers out there that have less rights and that providing access to the arbitration system, we're really giving them more.

I think it's fair to say that what we probably came up would be more accurate in the legal terminology to call it mandatory mediation, I suspect, but I think we thought it was very critical to get the consumer into the process. If then the consumer wants to use whatever rights they may or may not have, then they will continue to have that right.

MS. WELLBERY: Okay. Steve?

MR. WARE: I wanted to respond to Susan Grant's question, which if I can paraphrase is if binding arbitration is good for the consumer, why do we have to force the consumer into it? Why can't we allow the

consumer to choose it once a dispute has arisen? And the answer to that, I think, goes to the effect predispute arbitration agreements have on the prices consumers pay.

I think a helpful way to consider and to think about arbitration is as something that lowers cost to businesses, sort of like a technical innovation or a better way to run an assembly line, something that lowers cost to business, and that ultimately lowers prices to consumers. That's just Economics 101; that's how competition works. So, consumers benefit from arbitration clauses in general.

Now, there may be some consumers -- in fact, I'm sure there are -- some consumers who once a dispute has arisen, they wish there was no arbitration clause in the contract, because now they could have more leverage in settlement negotiations if they had the right to litigate, particularly a jury trial, than if they're bound to arbitration. So, I think it's going to cut depending on which kind of consumer you are, whether you're better or worse off with the arbitration clause, but most of us consumers who don't bring a lot of claims against our sellers or our lenders, we're better off with the lower prices.

Now, I think the interesting question for the

panel to pursue there is why is arbitration lowering costs to businesses? There's lots of reasons, but just two I'd like to suggest to everybody because they cut very differently, if arbitration is lowering costs to business because there are lower awards, the amount defendants lose, have to pay, is lower than they pay in litigation, well, you can see that that's a downside to the plaintiff, to the consumer.

On the other hand, if the reason arbitration is saving business money is just because the cost of getting to that result is lower. In other words, same results on average as in litigation, but it costs less to get to those results, because the process is faster, more efficient. Well, then, it's hard to see how the consumer loses at all there. That looks win-win for everybody, except perhaps for the trial lawyers, who are a big part of those costs of litigation.

MS. WELLBERY: Steve, can I ask, are you aware of any studies that indicate or support the assertions that you just made that it lowers prices and generally benefits consumers?

MR. WARE: Well, you know, there's examples of it anecdotally. There's no studies, and I don't know if you could formulate a study either way that would be scientifically sound. There's anecdotes, though.

I know, for example, one lender in the state I live in, Alabama, will charge you 18.5 percent interest rate but only 16.5 percent if you have an arbitration clause in your contract. There is consumer choice here. There's a plaintiff's lawyer in Alabama, well-known guy, discovered he had an arbitration clause in his credit card agreement, so he cancelled that card and got another card that didn't have an arbitration clause. I think that's great, and I think that that's a particularly educated consumer.

People are certainly right to point out that consumers don't know what's on page 9 of their 11-page contract, and consumer education about ADR is probably one of the biggest things we can accomplish here, and I think a good analogy for that is long distance service. Remember there used to be a monopoly on long distance service, and then when we had competition in long distance, now consumers have to be educated about the different long distance companies, the different plans they offer. I think that's sort of what we're seeing here. The court was the monopoly, and now we've got competition. Consumers are going to have to learn what's best for them.

MS. WELLBERY: Steve Sakamoto-Wengel?

MR. SAKAMOTO-WENGEL: Yeah, there are --

lowering cost to business is not necessarily good in and of itself. There are a lot of things that might lower costs to businesses that aren't necessarily good for consumers, even though they would pay lower prices. If they're giving up their rights as a result to be able to get the lower prices, we don't think that's a good thing.

We in the Maryland Attorney General's Office think arbitration is a great thing. We have our own arbitration program in the Consumer Protection Division; however, it's a voluntary arbitration program that at a time a dispute arises, the parties agree to participate in an arbitration agreement.

I disagree with the assertion that consumers are voluntarily entering into these agreements. If you want to get a credit card today, good luck trying to find a credit card that does not include a mandatory arbitration clause, and I -- we're afraid that that's the way that, you know, disputes over the internet are going to go.

Additionally, with requiring consumers to participate in an alternative dispute resolution mechanism before they go to court, especially where you have a small amount in controversy, that's just going to raise the costs for consumers. They are going to

have to go through two processes to resolve what's a small amount dispute rather than go through one.

I would like to just second Susan's comments that if the alternative programs that we do encourage, you know, businesses to set up alternative dispute resolution programs that consumers can voluntarily participate in, and if they are fair and if they're perceived as being low cost and the end results are fair, we believe consumers will, in fact, take advantage of those, but we feel that it's wrong to impose them on consumers without their knowledge and consent.

MS. WELLBERY: Thank you.

John, please?

MR. VAIL: I want to do two things. First, just empirically, to respond to your question about does arbitration lower costs, you know, I have scanned the academic data here, and there are very few. Anecdotally, I think all of us expect that that's true, but we actually know very little about it in the consumer context. There are some reasons for that.

One is because arbitration results are generally proprietary and are not open to academic research or to study. This is a conclusion in a Rand Foundation study; this isn't my conclusion.

One of the things you do seem to find is whether it lowers costs depends very much on the kind of disputes to which it's applied, and I think, you know, your general feeling that when you're talking about small consumer disputes, you are likely to find a lowering of transactions costs. You are less likely to find it the more complicated the dispute.

In fact, one of the things that Rand researchers found in a study of corporate counsels of health organizations is that they were resisting putting arbitration clauses in their contracts to some extent because they expected that they were better off in litigation than in arbitration. It would be cheaper for them both in transactions costs and in results.

The timing of them also is an issue, I think. One of the things -- and this goes to my second point. I want to talk about dispute resolution as a function of sovereignty, and I think one of the reactions you're finding to arbitration in general is that some people prefer arbitration because simply the public dispute resolution mechanisms are underfunded and don't work right. I don't think that's a reason to abandon them when they've served us well for many reasons.

Arbitration, mandatory arbitration in particular, does result in the privatization of the

legal system, and I think, you know, often when I participate in these debates, I feel as if I were somebody in the 1820s or '30s listening to railroads saying just give us eminent domain, let us go, everything will be fine. In general we did that, and I think there was a legitimate debate among historians about whether that was a good or bad thing for America economically, but there's no doubt about what the political reaction was.

You see Constitutional conventions throughout America in the 1830s, '40s, '50s, '60s, writing very specific restrictions about railroads, canal companies and some of the most vitriolic debates and rhetoric much more flaming than any I ever used in my comments here regarding those things.

We have different kinds of rules, and I think it's important that we not lose some of them. We have a public interest in the public resolution of at least some kinds of disputes. We have certain disputes where our legal systems provide essentially default rules. You have a contract to deliver the widgets, you didn't say where the widgets are going to be delivered, so we have a default rule that assumes they'll be delivered in a certain place, and we allow you to vary that in your contract. We don't have a huge public interest

in whether you deliver FOB New York or they're considered delivered when they arrive at your factory.

We have a huge public interest in whether minimum wage is paid under an employment contract. We have expressed a very specific public interest in seeing that that's done, and when we have disputes about that, we need public access to the resolution of those disputes to assure that our public interest is being vindicated in the dispute resolution mechanism itself, and I think that's the key thing.

My colleague, Ms. Wallis, referred to the merging of rules in the European Union as it became one market, and Ron Plesser's group proposes that such a merger of rules should and will take place, and I expect that they will. I expect that with this globalization of individual consumer transactions across borders that new rules will evolve.

The question for me is largely who makes those rules, whether it will be given to corporate power to make those rules or whether, as happened in the European Union, there were quite bruising political debates about how those rules should be made and what their content should be.

This is a debate about sovereignty and sovereign power and who wields it and how they wield

it, and in that sense I think a much larger forum is necessary for its discussion than will occur among these debates.

Most of the things -- I think most anything that companies want to offer to consumers they can do under the U.S. legal framework. I see no barriers to companies offering consumers wonderful dispute resolution mechanisms. The thing I do see is, you know, their caution is their need for a shield from certain liabilities.

MS. WELLBERY: John, if I could interrupt, I very much appreciate your comments, and I appreciate the fact that you pointed out that we perhaps have a clash of absolutes here, and to play devil's advocate a bit, we certainly have a Constitutional right in favor of going to court, but we also have policy, a public policy, of encouraging settlements, even in the criminal context where we encourage plea bargaining.

So, I think it's helpful to think about -- to think about how we take these two what seem to be some clashes of absolutes and find appropriate places where perhaps there should be some compromise, and under what situation, what stakeholders need to be present, are there certain situations that that compromise makes more sense, how do you build in fairness in going

through that compromise.

Eric?

MR. MOGILNICKI: Well, a couple things. First, I think it's important to note the nature of the Seventh Amendment right, which is that Congress shall pass no law abridging your right to a jury trial, but that has no bearing on what we're talking about here, which is when parties agree individually to forego one path and take another.

Second, I want to answer your prior question, which was whether there are studies on this issue, and I agree with John, there's not enough information here, and, of course, in the absence of information, there's an argument against regulation at this time, but I would point you to a study published in the Columbia Human Rights Law Review by Louis Molpe. What Molpe did was study several years of AAA arbitration results against federal court results in the same kind of case. These were employment cases. That's the kind of case that has historically most used arbitration. And what Molpe found is that it is much faster to go through arbitration, and individuals are four times more likely to prevail.

Now, given that -- I should concede that people gained less -- they won less money when they prevailed

in arbitration than in litigation, but given that so many more people prevailed, the expected value of going through the litigation or arbitration process was much higher for arbitration than it is for litigation, and that I think is the single best study that compares apples to apples, arbitration to litigation, over the same kinds of disputes.

MR. STEVENSON: Just to follow up on that, obviously some of the kinds of claims we focus on are relatively small dollar transactions. Does the answer to -- that John Vail and Eric, issues they've posed, differ depending upon the kind of claim? We were talking in the prior panel about applicable sort of rules of procedure and should you look at the kind of effectively small product claims differently from the other issues? Does that raise different issues about railroading consumers or is that, in fact, if the trade-off may be faster process but lower result, does that have an effect on how you look at what role arbitration should play?

MS. GRANT: Can I answer that in a roundabout way?

It would surprise me to assume, even if arbitration results and saving money for companies, that that always gets passed along to consumers. If

you look at the exorbitant late fees, over-the-limit fees and other fees of credit card companies, and you wonder, where's the evidence of that? But let's say that that was true, that it actually did lower the cost, and picking up on other people's comments, ask yourself is that what's most important or is what's most important justice for consumers, a common goal of all of us that we're all willing to pay for in one way or another?

And if justice for consumers is the compelling issue here, then to me, regardless of the amount of the dispute, it's up to the consumer to decide what's the best forum and when to go with the dispute.

If you think about the mandatory scheme, then consider the fact that the consumer's case might not be appropriate for that, ADR, it might be a case of fraud. Perhaps there was a class action lawsuit that the consumer wants to participate in. Perhaps there's something going on at an attorney general's office that the consumer wants to be part of.

And, in fact, having the consumer's complaint is very important for that office to deal with what might be larger issues that we're all very concerned about of unfair, deceptive acts and practices. So, I think that it's not a fair trade-off and really not

ultimately in anybody's interest to preclude the consumer from being able make those other choices, even if it ends up costing us a little bit more to achieve social justice.

MS. WELLBERY: I guess it would be helpful, I think, if the panelists, to the extent that you think that mandatory arbitration requirements are problematic, to express exactly why they're problematic, and I think it seems more obvious to me why a binding requirement would be problematic, but why would a mandatory option be problematic?

John?

MR. VAIL: I have one response to that, and it's really a qualified one. Taking, for example, the proposal of the e-commerce group, which I'll characterize as mandatory, nonbinding -- I think that's fair, and I mean to be fair -- but the question there is whether, at least under the American justice system, and this wouldn't largely affect the European practice, is whether that kind of requirement could be a barrier to agglomerating consumers into a class seeking class action relief.

I think the existing case law out there is not -- there's not a lot of it. It's not necessarily well published or well found, but in what I can find of it,

it's divided. There are cases that have denied class certification because class -- you know, alleged class members, putative class members, had not exhausted a mandatory procedure. So, I think that's a problem, because I think the consumer class action is liable to be a more effective form of relief for consumers than the individual arbitral system.

MS. WELLBERY: Ron?

MR. PLESSER: Well, I just think we need to have a little perspective about this. I mean, I don't think we're talking about -- I mean, justice, rights, adjudication. We're talking about consumer disputes with merchants that are, at least in our domestic system, has given to small claims courts, and those of you who have practiced in small claims courts, justice may or may not be the right word. It is an appropriate way to adjudicate claims, and it's been very effective.

It is not realistic to think that that kind of system can work on the internet. It just isn't. If you're in -- if you're doing -- a consumer who's doing global e-commerce, I mean, Brooklyn, New York has a great small claims system, but if you're in France or Italy and you order something from a New York company, you're just not going to go there. It's not going to help. You're not going to take the trip.

I think we have got to look at the total -- Susan just cut my mike off, I think -- but I think you have to look at -- what we're really talking about is how do we create a system that works on the net for adjudication of these fairly small claims so that the consumer can be protected and get adjudication.

Our group says go there first. I have a little anecdote that I just have to throw in. My son goes to private school in the District of Columbia, and they have a huge auction every year, and it was fairly recently, and for some reason I was put on the complaint desk, and several hundred thousand dollars were raised in this action, and there were three of us who ran the complaint desk, essentially. And I would say of the tens and tens of complaints about what people auctioned for, what they thought they got, what the final price was, all of -- you know, we got very legitimate complaints, there was only one that probably would go to a next level. There was one legitimate kind of dispute. Not the others weren't legitimate, they were legitimate, but they were resolvable.

And what I think we want to do is try to resolve the issues, let it get into the process of the online dispute mechanisms, kind of things that the BBB is developing and the other companies are developing,

and if this one out of a hundred dispute continues, then let those parties go to court and take it to the next process, but let's create a system and support a system that's really going to resolve the problems, and let's not start thinking about, oh, class actions and all that kind of stuff before we really have to create an online mechanism that will help consumers resolve the issues.

Class actions, in the end, may help some on very huge issues, but they are not going to help the -- you know, they are not going to help me if I spend $20 for something and I got a cardboard imitation of what I thought a leather wallet was going to be. Class actions aren't really going to help me. A complaint to the Federal Trade Commission, a small claims type of adjudication, is what I need.

MS. WELLBERY: Paul?

MR. BLAND: I think there's a lot of truth to what you said, but I don't agree with it completely. There are a lot of these cases that are going to be things that would be in small claims court, but in America, at least, we have a lot of consumer laws that apply to certain types of consumer transactions that can involve very small dollar figures, the Truth in Lending Act, Fair Debt Collection, Fair Credit

Reporting Act claims. Some of these do raise important issues. And even if they involve small sums of money, frequently they involve declaratory or injunctive relief, and they are important issues.

Now, that's not to say that I'm totally against what Mr. Plesser and his group are talking about in terms of a nonbinding, mandatory system, sort of being called mandatory mediation, but I think that that -- because that these can be important issues sometimes, they are not all of these sort of nickel and dime, unimportant issues in the broad category of things, I think there's a couple of important qualifications or concerns you should attach to it.

The first is, I think it's important to have some transparency as to the legal rulings that come out. If there are going to be legal rulings that are going to be issued by these types of bodies, right now, much of mandatory dispute resolution in this country is entirely confidential, it is secreted, it's impossible to find out, and instead of having the courts and bodies like the FTC that are figuring out what some of these statutes like Truth in Lending mean, we have a whole bunch of private arbitrators secretly deciding what these things mean, and there's a loss of a lot of public law, and that's a concern to people on the

consumer side who have an interest in seeing that law developed.

Secondly is if they are going to have a mandatory system, even if it's nonbinding, I strongly think that people should consider giving some kind of competition for the consumer to have a chance to choose between alternative providers of ADR. Let me explain why.

Right now, because we've all talked about the fact that consumers don't focus on this issue of dispute resolution at the outset and the businesses do, the businesses are the ones who decide who is going to be the ADR provider. That's why part of this entire conference has been this wonderful dog and pony show of different people trying to sell their ADR services to people. I mean, the businesses are the ones who are making those calls, not the consumers right now.

What does that cause? One of the things that causes is if you look at some of the solicitation letters and some of the ways that some of these arbitration service providers sell themselves, the way they market themselves, it's sort of a wink-wink, nudge-nudge, you know, we will give you a better deal. Well, gee, if you go to the AAA, maybe sometimes consumers get a lot of discovery against the business.

Not at our ADR provider, wink-wink, you know, and what it leads to is it leads to a system sometimes where people are competing in a race to the bottom, and I think that if you had -- after the dispute arose, then the consumer had a right to choose which ADR provider he was going to go to or she was going to go to, you might see a competition that was a little bit more likely to lead to systems that are fair.

Just one final quick point, if I can make on this point, if you're going to have a mandatory system, even if it's nonbinding, you have to make sure that the system doesn't have any rules that are set up in such a way as to discourage people from going forward. For example, many ADR providers -- and I believe Mr. Anderson's, if I'm not mistaken -- have a loser pays rule in it. In other words, if a consumer brings a case and they lose, they end up paying the other side's attorneys' fees.

Well, they say, well, that discourages frivolous cases. It also discourages almost any case. I mean, now, at Eric's firm, correct me if I'm wrong, but I thought that Legal Times the other day said that a first-year associate at your firm gets like $120,000 a year, in that neighborhood, something like that?

MR. MOGILNICKI: All I know is it's too much.

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MR. BLAND: Well, whatever they're billing that person at --

MR. PLESSER: More than we made when we started, I can tell you that.

MR. BLAND: And a hefty increment over my salary.

But -- the Ralph Nader world not nearly being so kind.

But the point that I make is if a consumer's got a claim, you know, the type of claim that Ron's talking about, the bad wallet, wants to bring a claim in ADR where it's a loser pays deals and the first-year associate's assigned to it and spends two hours on it, and they get a bill for $400 when they lose, the consumers are going to quickly get the message that they can't go forward.

Now, one of the things that happens, if you say, well, you have to exhaust the ADR, you have to do the ADR first before you get to court, but then they set up the ADR, that says, oh, by the way, if you go into ADR, someone is going to hit you in the head with an aluminum baseball bat, you'd be nuts to do it, then this creates a kind of situation that Joseph Keller wrote about in Catch-22. No one will go into it to

exhaust their remedies to go to the next step.

And now you may think that I'm exaggerating, there is an element of hyperbole in the way I presented this, but the truth is that loser pays clauses are common and they stop consumers from bringing cases every day. I know a lot of consumer lawyers who walk away from these cases, who send people out of their office and give them advice, you would be nuts to go forward, because you are burdened by this ADR cause, and you have no -- there is some risk, there is a 10 percent litigation risk, and if you lose, you are going to be creamed.

And I think that those are the types of things -- you can say, well, you know, this just says mandatory mediation, how bad can that be? Well, there's some clever minds out there who found some ways to make it pretty bad, and I think that you can't take this too lightly.

MR. STEVENSON: Well, I was going to ask a question on another point, but maybe we should ask Ron, your group's proposal, aluminum baseball bat or what effect --

MR. PLESSER: I was going to avoid the response. I really don't think so. I mean, I think it's an interesting point, and frankly, maybe in my own

ignorance, one that I have not really focused on. I think that that would not be the intent of charging, you know, somebody who uses the system. I think our assumption has been, and I think we state it in our guidelines, that the system -- you know, ADR should be at no cost to the consumer, and so I think that's an important concept. I mean, I don't want to say anything here that will be used against that clause in inappropriate places, but I think our concept is that it should be a noncost option to the consumer.

MR. STEVENSON: Okay.

MR. VAIL: Can I pose an informational question to Ron?

MR. PLESSER: Let me get my thing out so I can make sure I'm saying the right thing. You can ask the question.

MR. VAIL: Yeah, it's just what governmental action is necessary to implement the proposal if you're a group?

MR. PLESSER: What governmental action is necessary to implement -- I don't think there is any governmental action that's necessary. We would like government to work with us in seeing if we can't come to some better, common understanding of how jurisdiction should work on the net.

In terms of coming up with this code of conduct, we explicitly issued a comment on jurisdiction issues, because we don't want that debate to end. We think it needs to continue. I think we do think, you know, as always, and I've done these exercises before, if companies, at least in the United States, promise they're going to do something and they don't, then all of a sudden the law does apply. Then we do have Section 5 of the Federal Trade Commission Act that can proceed against companies who are deceptive, and I think if you said that you had ADR and you made representations about the ADR and, in fact, it wasn't there or it -- I'm not saying it didn't work, but if it really didn't work or wasn't a legitimate effort, then clearly there would be a serious question of deception under Article 5. I know there's other countries that have similar provisions. So, I think we do view deception laws as kind of backing up the claims that you're going to use these services.

MS. WELLBERY: Diana, can I ask you to comment on this debate from the perspective of European law? And I think you already touched on the fact that you can't have binding arbitration clauses in Europe. What about mandatory?

MS. WALLIS: I think mandatory, it's worth

considering partly as an incentive to get businesses or traders into ADR schemes, but I think if that is the case, then we have to be very clear about the limited class of disputes that we're dealing with, which brings me back to what I said earlier.

I think if we are dealing with run of the mill, if you can say that, consumer disputes, then it may be appropriate to have a mandatory clause, but not binding. That would be one possible approach, I think.

But I think the other interesting discussion that's been raised is about the question of what should government do, this last question, because when we had our workshop in Brussels on this subject, it was quite interesting that some of the participants from the business side were actually saying we want some guidance from you. We want to know what the framework is.

So, I'm not sure if the pure self-regulatory suggestions that have been put forward in Ron's code, which I happen to think is very good, would work in European contexts. People want some certainty as to what the system is going to be and what sort of systems they as businesses should be putting investment in to set up. So, I think we have to achieve a balance in that respect.

MS. WELLBERY: Thank you.

Steve?

MR. SAKAMOTO-WENGEL: I wanted to just address the notion that this provides a more informal dispute resolution procedure for consumers to have to go through, but most consumers don't just run off to small claims court. In most cases they will have contacted the business to try to resolve their dispute, you know, beforehand, and it's only at that point when whatever resolution is or isn't is not satisfactory that they will want to go to small claims court, but they are at that point told, sorry, you can't do that, you have to go through our own program that is provided for in our contract, even though you've already contacted us, and that wasn't satisfactory. We don't believe that that furthers the goal of having some kind of informal resolution dispute, especially when the cost of filing an action in small claims court would be a hundred dollars or less, and not even if it's loser pays or has to split the difference, it's going to be several hundred dollars for a consumer to proceed through arbitration in what could be a very small cost dispute.

So, we think that, you know, if the business is interested in informal resolution, there are opportunities to do that without requiring mandatory

arbitration.

MR. STEVENSON: Can I pose a slightly different or a variation on the mandatory but not binding model?

MR. PLESSER: I just want to do a correction on the record. What our proposal says is merchants should provide consumers with fair, timely and affordable means to settle disputes and obtain -- so, I think we did think about costs. I don't think it would be necessarily free in every instance, but certainly affordability would be important, and I don't think the legal fees at Wilmer Cutler or Piper & Marbury are affordable.

I don't think the user takes all -- I don't think the user takes all, at least --

MR. STEVENSON: That was your question.

MR. PLESSER: -- user takes -- but I think the loser pays rules is not really a standard, and while I think that is some concern, I don't think it is the kind of thing that we would be pushing for at all.

MR. STEVENSON: Well, that actually ties into my question, was to consider a model that I think is patterned -- is basically the model that the Magnuson-Moss Warranty follows. If I've got this wrong, fortunately my boss just stepped out of the room, so -- but as I understand it, it provides for a

sort of mandatory but not binding model with perhaps two other qualifications. One, I believe that there's an exception for class actions, and one could have, I suppose, a further exception for governmental actions, I'm not sure whether it has that, and the other, I believe it indicates -- it contemplates a procedure that is of no cost to the consumer but does permit the process to be mandatory before one goes to the other -- to the -- to court.

Does that model address some of the concerns that are out there, for example, yours, John, about mandatory but not binding?

I'm sorry, Barbara, did you want to add --

MS. WELLBERY: I believe it also has some requirements for procedural fairness that would be relevant.

MR. VAIL: I think it probably does. I've heard -- I don't claim expertise in that area of law, but certainly I've talked to people who do and who have it, but I think this idea, you know, the ideas that -- let me back up for a second and say that I don't want to be the whole naysayer in this event. I think that good systems for dispute resolution on the net can really -- can be a boon for consumers, and I say that as one here who has spent a good deal of time

practicing in small claims courts in places like McDowell County, North Carolina or Mountain City, Tennessee, but they -- so, yes, I think that kind of exception to assure the viability of the class actions -- I don't know -- you know, I look at the question of the fairness of the system perhaps as more one for the market than for regulation, as what evolves and how well people do these things as being part of their branding.

It may be, you know, it may be more important. In the Magnuson-Moss model, you have the FTC's certification. Are there any arbitral systems now that are currently certified under the FTC standards? Someone told me there are not, and I don't want to represent that that's true. I don't know.

MR. STEVENSON: I think we later have Russ Bodoff from the BBB, who might be able to comment further on that, but --

MR. ANDERSON: I think that the idea -- I should say on behalf of a provider, and I think I speak for the other providers, we look to the FTC, we look to the courts, we look to the Congress to make the rules. We provide arbitration within the rules that are set down by the law, set down by the regulatory community.

The idea that businesses make the rules or even

that we make the rules is a misapprehension. The courts, at least in this country, have set down hundreds of standards about what's permissible arbitration. A lot of times they don't ask me what I think, but for the most part, I think they're pretty good standards.

We have a bill of rights. We don't administer arbitrations that do not -- arbitrations that arise under contracts that do not conform to that bill of rights. I think at the core, we're really talking about competing public interests. John brought up, on one hand, yes, we have an interest in having cases resolved in the court system. On the other hand, we have an interest in access to justice. Paul brought up the "loser pays" question. The ABA says, the American Bar Association as opposed to the Bankers Association, the ABA says that a lawyer cannot take a case worth less than $20,000.

I saw an online arbitration, went through our system a couple of months ago, for a buck. The filing fee was $49, it was a complaint about -- a consumer complaint with a local merchant. The consumer prevailed. He got back his buck, and he got his $49. You can't even go down and sit in the small claims court for a half a day for $49. Is that a good system?

Is that a bad system?

There's this consumer -- there's a consumer arbitration case before the Supreme Court. If the Supreme Court were to say or the FTC or the Department of Commerce were to say, corporations, whoever they might be, vendors, traders, have to pay all of the expenses of arbitration, that would be the arbitration rule. Is that good? Is that bad? One has to ask traders and corporations.

But in this electronic commerce system, we're going to have to come up with some way, because as several people have said, you can't go to the Brooklyn small claims court.

MS. WELLBERY: Susan?

MS. GRANT: The closest model to Magnuson-Moss that I can think of in the consumer world is the state lemon law system, and, in fact, consumers usually do have to pay a significant fee, but they get their money back if they win from the other side.

I think personally that the exhaustion rules that you find in those systems were a political calculation that were made when the lemon laws were passed to try to pass the laws and get around objections from the auto manufacturers. And maybe because it's a really high-ticket item, it makes more

sense than in smaller disputes.

At our internet fraud watch at the National Consumers League, the average loss that we hear about from consumers in internet fraud is $300 per person. So, you know, we're not talking about very big disputes.

And I still haven't heard any compelling reasons in this discussion for why you should force consumers to go through whatever ADR system you subscribe to. I think that, in fact, if good alternatives are developed for consumers that you'll see organizations like the National Consumers League and even state and local consumer agencies that handle complaints promoting their use, at least for certain kinds of things.

You know, we don't want to be hearing about the musty, oversized chair -- overstuffed chair from yesterday. You know, so there are quite appropriate instances for it, but I think it's -- you go down a slippery slope when you try to carve out, well, what are the ones by law that should have to go that way and not, and I think that ultimately it makes more sense to present the alternatives to consumers, make them sound as attractive as possible, and basically let the marketplace dictate what consumers will do with their

disputes.

MS. WELLBERY: Ron, do you have any response to that?

MR. PLESSER: Well, I think the reasons -- I'm not sure that Susan was talking about our approach, whether it was mandatory or just the exhaustion of remedy approach, but on the exhaustion of remedy approach, which says you have to go there first, I think, you know, you have got to look at the balance of the interests. These systems will cost a lot of money to development. Most of the costs will be borne by the business. We don't think it's unreasonable to say that if a business sets up one of these systems that they have a -- that it's inappropriate to say, you know, take a shot at this first. If that's unsatisfactory to the consumer, then the consumer can go to court.

I just fail to see at the $300 level why there would be a disadvantage of going through the system. We're talking about hopefully systems that are set up, you know, for e-mail exchanges, that can work within, you know, 48 hours, a week. We're talking about things that can operate very quickly. Why would that -- why -- the small trade-off that I think at least our group is looking for is to say, well, we want to see all of the complaints, and we don't want to do this and then

also have to worry about defending things in court that we haven't had at least an opportunity to resolve. So, I think it's a balance.

I mean, I don't disagree with Susan's thing, but I think in going forward, you do have to create some balance. I think this is an interest for the efficiency and costs of the system, and so that's the basic defense.

MS. WELLBERY: What about the argument that this is an attractive system that consumers feel will provide them with certainly fair procedures and the opportunity for real redress, particularly in the online world, since the options are so -- are not very viable? Why do you need to prescribe this? Why can't you leave it voluntary?

MR. PLESSER: Well, I was delighted to hear American Trial Lawyers before talk about let the market work. I think we're very supportive of that. You know, I think we're all stepping into unknown territory here. I mean, I think it may be that with experience in the market that the exhaustion concept that we have may be one that may be proven not to be necessary, but I think in making these decisions, both from a policy and a cost basis, I think it's a little bit of a safeguard to go forward.

It may be that we'll sit down and the experience in a number of years is that people naturally go to the ADR and don't want to go into courts, and I think if that's the case, then we'll take a look at the policy again. I think you do have to -- I mean, we were all struck yesterday by the companies who were saying, well, we have been in business since June of 1999 or we've been in -- you know, they're counting by months their seniority, and I think this is just a brand new field, and, you know, I think we wanted just a little bit of a safety valve going into it.

It may turn out that Susan's absolutely right, but let's get a little bit of experience before we make that decision.

MS. WELLBERY: Eric?

MR. MOGILNICKI: Let me take a crack at answering your question and Susan's, as well. Susan's was, well, why should you force consumers to go through ADR? And I agree, no one should be forced to go through ADR. They should only be required to adhere to the contract that they agree to. So, the question is, when it appropriate -- when is it appropriate for people to agree to ADR?

Certainly no one on this panel would be against

people agreeing to ADR once a dispute has arisen. That would be fair. And I have not heard any justification for believing that consumers are incapable of making a decision they can make once a dispute arises before a dispute arises based on a balancing of their interests.

As for businesses, fewer businesses will offer arbitration if it's binding only on them or if it's not mandatory for the simple reason that part of the overall savings of arbitration is knowing that there's finality before litigation, and so on the margin, the savings will be smaller, and on the margin, fewer businesses will offer any kind of ADR because of the reduced cost savings to them.

And I think that would be unfortunate for consumers, because I think that binding, mandatory arbitration is still better than litigation, and if removing the ability of a company to make it binding and mandatory decreases the number of companies offering arbitration, then you've done consumers a disservice, even though you're doing it in their name.

MS. WELLBERY: Is anybody aware of any studies that have been done that indicate whether where there is -- it doesn't make sense obviously in the world of binding arbitration, but in the world of nonbinding arbitration or at least where it's not binding on the

consumer, how many consumers then go on to bring lawsuits?

Susan?

MS. GRANT: I have done a little research in auto lemon laws. For instance, in California, a large state with lots of drivers in it, last year, only 8 percent of the consumers who lost their lemon law arbitrations then took their cases to court. In talking to lemon law administrators around the country, I hear similar tales of very low numbers, and many of the consumers in the surveys that the states do afterwards expressed the feeling that they felt that the process was fair and that their concerns were heard, and that went a long way towards making them feel better even if they lost.

And it's still a daunting prospect to sue. I mean, it's an expensive thing to do. Actually, I think that consumers would be even less likely to sue in the kinds of situations that we're talking about, because, for instance, cars are a very high-ticket item. You might have more interest in suing in that case than a smaller ticket item. All of the complications and burdens that we've talked about concerning cross-border litigation are another real disincentive for consumers to take their cases forward in court, giving them even

more of an incentive to consider the alternatives that are available to them.

MS. WELLBERY: I will ask one more question, then I think we will take questions from the audience. There seem to be some firmly held views on whether arbitration should be binding on consumers. I'd be interested in hearing what the views are and whether arbitration should be binding on the company. Does anybody want to take a crack at that?

Susan?

MS. GRANT: We like that idea. It's found, for instance, in the lemon laws. I think personally it would be a really smart idea on the part of companies who either develop ADR systems of their own or shop for ADR systems to use. You know, I think it's a selling feature to tell people that we will abide by the decision. I think that, in fact, gives consumers more confidence going into it.

MS. WELLBERY: Any other views before I take questions from the audience?

David, I've been wondering why you've been standing there.

MR. JOHNSON: David Johnson, Wilmer Cutler.

I can phrase this as a question if I must, but I want to draw our attention from the question of

exhaustion to the question that raised all of this, which is how a merchant deals with the possibility of being brought into a court in a foreign country where they don't have a presence but where they may be capable of being -- of claiming to be subject to jurisdiction, and we have an example in the ICANN dispute resolution process of one that was set up to require exhaustion but not to be binding, and we have a history now over the last few months of a large number of cases with very little need for any further proceedings.

So, I think one of the arguments for requiring exhaustion is if you're trying to sell a new process, if you will, to consumers who haven't got a history of seeing that it's fair, don't know that they'll be satisfied, and one reason, therefore, to require exhaustion is to give companies a sense that they are really getting the benefit of being able to prove to consumers that it's a fair process and getting some relief from consumers who might otherwise go to courts in local jurisdictions far removed from merchant and impose more than the traditional costs imposed if someone goes to a legal small claims court.

I guess the question is is whether anyone on the panel agrees with the UDRP process under ICANN is

indicative of that exhaustion, in fact, can be a good idea to get a process going?

MS. WELLBERY: Steve?

MR. SAKAMOTO-WENGEL: I mean, I guess we're talking about the balance between having put the burden on the business that's putting its product on the internet or, you know, currently putting its product into interstate commerce versus the consumer who may be required -- a Maryland consumer who may be required to go to Redmond, Washington if they have a problem with a Microsoft product to bring their dispute. We think that the law has struck a balance in favor of the consumer and the consumer should be able to, if a merchant is putting into product into interstate commerce or in this case on the internet, the burden should follow upon that business, not on the consumer, to have to leave where they are and go out to another jurisdiction and try to resolve their particular consumer dispute, and so I think you have to strike the balance there. Maybe it is unfair in some cases, but if you do provide a voluntary ADR program that is attractive to consumers, then consumers will take advantage of that. If what you're doing is forcing consumers to go through it, that is what we have a concern about.

MR. VAIL: I second that. I'll just say the baseline is that you comply with the law, and then if you can do things that lower your costs within that framework, that's fine. The ICANN example particularly, I think one of the questions there is why don't people proceed? Is it because they're satisfied with the results, or is it because they simply perceive the costs of proceeding to be too great? I don't know the answer to that.

MS. WELLBERY: Any other comments?

MR. ANDERSON: I should say, we administer or are one of the administrators of the UDRP for ICANN, and I think the distinctive thing about the UDRP is it's online, that there is no "there" there, in effect. The jurisdiction is -- it's kind of probably unfair to characterize it as in rem, but it's -- the process is conducted in neither place, neither -- in neither jurisdiction of the claimant or the respondent, and I think that that is an excellent model, and I think the exhaustion -- exhaustion is probably not exactly right, because you can jump in and bring court action while the process is going on, but I think the model works quite well. There are tough issues for very a nominal amount of money. It's very difficult for the arbitrators.

MS. WELLBERY: Yes?

MR. MENGE: Yes, good afternoon, my name is Eric Menge. I'm with the United States Small Business Administration. I have a question for the panel, if anyone on the panel has considered the impact that an ADR will have upon small businesses, keeping in mind that they will both be consumers and sellers in electronic commerce, what would be the benefits and draw-backs be for them?

MR. BLAND: One indication that at least some small businesses will be sympathetic to my view is that right now you have pieces of legislation that has a number of co-sponsors in both of the Houses of the Congress where car dealers are saying that car manufacturers with their greater economic power are forcing car dealers into mandatory arbitration, a setting that's unfair, thus there's legislation to say you can have mandatory arbitration for everyone in the United States except for car dealers, and while I think that from the consumer standpoint there's something slightly hilarious about this, still it's interesting that you have some small businesses that feel that bigger businesses are imposing on them the way that many of my clients feel that, you know, many of Eric's clients are imposing on them.

MS. GRANT: I think small businesses will benefit greatly from ADR if it's done right, because it's difficult for them to resolve disputes in more formal avenues of recourse. They don't have lawyers on retainer to send out. I think that anything that can help small businesses resolve disputes in this way will save them money and time, which I think is especially valuable to small business people.

MR. MENGE: Thank you very much.

MS. WELLBERY: Another question?

MR. IDELS: I'm George Idels, I'm the editor of the Consumer Affairs Letter.

I'd like to address the issue of disclosure. We heard a lot about hidden clauses on page 9. I haven't heard anybody talk about a prominent disclosure of binding arbitration or any kind of arbitration policy, and perhaps the privacy policy is analogous.

Does anybody believe that we should have the same kind of online, fairly prominent disclosures that we have with privacy policies on arbitration policies?

MR. WARE: I would just make a point of law, there's a U.S. Supreme Court case called Doctors Associates vs. Cassaratto that holds the Federal Arbitration Act preempts a Montana state statute attempting to disclose the arbitration clause in a

contract by requiring notice on the first page in capital letters, bold, et cetera. So, I think you'd have to get at the federal level, in other words, states couldn't enact the sort of thing you're talking about. It would have to come at the federal level. It would have to really amend the Federal Arbitration Act, unless the Supreme Court changes its mind.

MR. BLAND: To give a slightly different view on that, the Federal Arbitration Act allows state law to govern with respect to questions of contract formation and standard contract defenses, and with respect to contract formation, as long as the state law doesn't explicitly distinguish and just discriminate against arbitration clauses. So, for example, in Doctors Associates, the statute said just arbitration clauses have to be on page 1 in certain size print.

Nonetheless, there are many states that have a generally applicable doctrine of law which is that the waiver of any Constitutional right will only be effective if it was knowing, voluntary and intelligent, meaning that the person actually really understood what they were doing, and I think that you're going to see a number -- a number of state courts have already applied the knowing, voluntary, intelligent standard on sort of a case-by-case basis, looking at whether or not

individuals really knew what they were doing or not.

But I think you are going to see a number of states that are not going to be going along with the idea that you are going to squirrel these things away in fine print in a way that people won't notice them. They are going to find that no valid contract has been created, and I do not think that those state decisions are going to be found to be preemptive under Doctors Associates, because they are going to be stemming from a broadly applicable body of law.

So, while he's correctly described the case, on the off chance that there's anyone in here who is a consumer advocate who would do one of these cases, I urge you not to give up on the argument, because there's a way of framing it that I think will and has worked.

MS. WELLBERY: Steve, just quickly, because we only have time for one more question.

MR. SAKAMOTO-WENGEL: Similarly, Maryland's Consumer Protection Act, most states' consumer protection act and the FTC Act have a requirement that, you know, you can't fail to disclose material facts, and if you're burying an arbitration clause somewhere in the fine print of a contract, I would argue that that is a failure to disclose a material fact to the

consumer which is one of the general requirements that applies to contracting generally and not necessarily something that would be preemptive under the Doctors Associates case. So, that's another angle for consumers to look at, but whether or not it's disclosed, if consumers don't have a choice whether to agree to it, then it doesn't really make as much of a difference.

MR. IDELS: Ron, does your idea include this? Have you thought about this in your proposal?

MR. PLESSER: Well, I think certainly. I mean, we -- all the notices need to be clear and conspicuous, easy to read, usable. I mean, I think we would have disclosure not only on the arbitration clauses, but on the other conditions in the contract should be, you know, I think the general standard is, you know, easy to read, easy to find, usable.

I think that part of -- you know, is it done by buttons, is it scrolled, is it in the terms of service, you know, these are things that hopefully the market will work out. I mean, when we're talking about online, we have a -- you know, it's a little bit different. Privacy notices have been criticized just last week, Senator McCain criticized some as being too long, then sometimes they get criticized for being too

short.

So, I think the market has to find the balance, but I would certainly agree that with the use of hypertext and buttons and homepages that somebody who wanted to find out how to go after a dispute could do it very quickly and easily, and our group would support that.

MS. WELLBERY: Last yes question, please.

MS. MILLAR: She Sheila Millar, Keller & Heckman. This question is primarily for Diana Wallis.

We had an interesting discussion earlier about the loser pay rule, and, of course, in our own parochial way, we focused, of course, on the U.S. system, ignoring the reality that elsewhere in the world, loser pay rules are more common, liberal discovery rules do not exist and contingent fee cases are often barred, all of which contribute to a much more pro-plaintiff, pro-consumer environment here in the U.S. but not elsewhere in the world, including the EU.

Does that affect your view on the appropriateness of arbitration, even binding arbitration. Will it give consumers a broader remedy, number one? And number two, conversely, for the European merchants who want to come to the U.S.

environment where they are not familiar with our very liberal pro-plaintiff environment, does that give them more certainty, as well?

MS. WALLIS: I'm awfully sorry, I didn't hear the first part of your question very well.

MS. MILLAR: Loser pay rules are more common around the world than they are in the U.S., as are bars on contingent fee cases and really an absence of the kind of liberal discovery rules that we have here, which are pro-consumer. That being the case, does that suggest that binding arbitration in that kind of legal environment offers a greater benefit to consumers?

MS. WALLIS: I think there are a number of big differences between what happens here and what happens in Europe, and one of the interesting discussions that I've just heard, of course, is the level of damages, which are obviously quite different between our two systems, and obviously some European businesses would be fearful of becoming involved in a situation here in the U.S. because for that reason. So, yes, there are these differences.

But I think we regard within the European Union that our level of consumer protection legislation is of a high level. Indeed, it's enshrined in the treaties that any legislation that we pass has to have a high

level, but as you rightly say, there are differences, and the whole push of what we're trying to do is to reach something that neutralizes those differences within an ADR system, but it may be as a result of that that there's some leveling out of damages, some leveling out of the way things are dealt with.

MS. WELLBERY: Thank you.

I think we've come to the end of this panel. People are probably quite hungry by now. Please join me in thanking the panelists for a very interesting discussion.

(Applause.)

MS. WELLBERY: Okay, I ask you all please to return by 1:30.

(Whereupon, at 12:30 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(1:30 p.m.)

MS. WELLBERY: If I could ask everybody to take their seats, we would like to begin this last presentation.

This panel is going to address the question of what the proper role for all the stakeholders should be, including governments, industry, consumer representatives, as we move forward to develop and implement alternative dispute resolution mechanisms.

We have a large and distinguished panel, and I will introduce everybody, and then we will just proceed to asking some questions and hopefully getting some answers.

To my immediate left is Sitesh Bhojani, then Steve Cole -- this is all wrong, it's all out of order. Why don't you introduce yourselves, because by list is entirely wrong.

MR. BODOFF: Russ Bodoff, and I'm the chief operating officer of BBB Online, and actually I'm filling in for Steve Cole today, which is part of the confusion.

MR. BUDNITZ: I'm Mark Budnitz, I teach at Georgia State University College of Law.

MR. DONAHEY: I'm Scott Donahey. I'm an

attorney, arbitrator and mediator from Palo Alto, California.

MR. FENOULHET: I'm Tim Fenoulhet from the European Commission. I work in the policy planning unit of the director general for the information society.

MS. FIENBERG: I'm Linda Fienberg. I'm with NASD, which is the parent of the NASDAQ market, and we run the largest security arbitration and mediation forum in the country, I guess in the world for that matter, and we have a real interest in providing forums and helping to develop them.

MS. KESSEDJIAN: I'm Catherine Kessedjian, I'm the Deputy Secretary General of the Hague Conference on private and international law in charge of this project on global convention on jurisdiction and enforcement of final judgments.

MR. MIERZWINSKI: Hi, I'm Ed Mierzwinski, the U.S. Public Interest Research Group, also a member of the steering committee of the Trans-Atlantic Consumer Dialogue, TACD.

MR. SKEHAN: My name is Paul Skehan. I'm the Deputy Secretary General of the Euro Chambers, the Association of European Chambers of Commerce. We have 1200 chambers, 14 million members, and we're interested

in developing an online ADR system.

MR. COOPER: I'm Scott Cooper with Hewlett-Packard.

MR. STEVENSON: Thank you all for being here. There are a number of questions that are relevant to this panel. Thinking about what we have been discussing this morning, I would suggest perhaps starting with number three that we have on our list, and then certainly we can go where the conversation takes us, but the question there is how governments can promote private sector led seal programs and similar self-regulatory initiatives, and I suppose the corollary to that is what role can government play in promoting ADR mechanisms in general that we have heard about.

If someone would like to volunteer, please.

MR. DONAHEY: There's been much discussion about the role that government can play or should play in the field of ADR and in the operation of the internet economy, and as I was listening in the audience, it struck me that we Americans always tend to think of our friends at the FTC and the Department of Commerce. We know we can depend upon them to make rationale rules and regulations and look out for our best interests, but when we start talking about

government regulation, we're not just talking about the United States and we're not just talking about the European community. We're talking about the modulus in Iran, we're talking about the People's Republic of China, we're talking about Singapore, we're talking about governments all over the world who also perceive that they have a sovereign right and interest in regulation.

And for the internet community, that is frightening, and I think even government regulation with the best of intention runs into the difficulty of clashes with other well-intentioned regulations set by another sovereign. So, I'm a little bit leery of regulation. I like the way that this question is posed in that it's posed as how governments can promote private sector web developments, and I think just as the United States Government and the Department of Commerce set up the internet corporation for assigned names and numbers or led to its establishment, I should say, by relinquishing control and asked that body to establish an ADR program that dealt with the issue of cybersquatting, I think that is the kind of approach that has produced I think real results in that area, and I would hope that similar kind of government cooperation with the private sector will be forthcoming

in the whole ADR area.

MR. STEVENSON: Commissioner Bhojani?

MR. BHOJANI: Thank you. Just before I comment on those issues, which is very relevant to what the last speaker just mentioned, can I just thank Hugh's statements and the Federal Trade Commission and the Department of Commerce for this opportunity and the invitation to participate from Australia in this workshop.

What I'd like to say is give you one illustration of how one government is dealing with these issues in the context of e-commerce, and that's very much in support of what the last speaker has just said.

In Australia, the government has set up and established a task force on industry self-regulation. It's not specific to e-commerce issues but will certainly focus on e-commerce issues. It has set out a policy paper on electronic commerce generally, which was distributed in October 1999, which is very much a hands-off, light-handed approach to regulation, as well as issuing a best practice model for business and consumer transaction last month.

It's an approach by the Australian Government, if anyone wants any of these publications, they're

available, surprisingly enough, on the web.

To just give you an illustration of how and one government is dealing with these issues, in Australia, we do have the experience of light-handed regulation in the context of industry-based codes of conduct that are voluntary, and then ultimately, if they don't succeed and consumers suffer as a consequence of that, to have them made mandatory.

There are a couple of issues that apply to the e-commerce sector that I think we need to take into account in regulation, and it seems to be almost assumed in the last day or so here that consumers are a homogeneous group, and I think that simply is not the case, and there have been a number of people that have tried to identify that consumers are not a homogeneous group. We have differences in languages, cultures, values and expectations.

There could be differences because of local or international, that is, geographical dimensions. And the consumers in America are not all a homogeneous group, let alone are consumers in one state of American I'd venture to suggest.

Similarly, it has been assumed that suppliers are a homogeneous group. Now, in this context of e-commerce, I'd say that suppliers are also

differentiated by the industry. So, while much of the focus is on e-commerce and online transactions, ultimately, as the marketplace of e-commerce matures, I think you'll find a greater degree of differentiation by industry sectors. So, it might be so much, well, are we using e-commerce or are we not, but what sector of the economy, what other services or products that we are actually providing. And again, there will be differentiation between businesses on the basis on which they use e-commerce.

For example, some of the major corporations, the big brand names, may only resort to e-commerce issues as a part of their overall business. However, e-commerce provides the opportunity, as some gentleman was saying this morning, for small and medium-based enterprises to effectively launch their businesses off onto the internet, so they have no other presence in the real world apart from e-commerce transactions.

So, how they deal with customers on the one hand as compared to perhaps a bigger organization or one with a market reputation may differ quite significantly. Those with a market reputation may be able to rely on their brand name. What does a small or medium enterprise do that doesn't have a brand name? It will have to rely on its credibility. How does it

establish its trust with consumers, be it at a local level or at an international level?

And it's with those factors in mind that I think ultimately what we will need to see happening at this stage of the e-commerce marketplace is for businesses to have a number of approaches to dispute resolution, depending on whether the transaction that they are involved in involves a local or domestic consumer or a cross-border consumer. Why should businesses only be focusing on the one area? If they choose to market their products on a global basis, then they need to be able to bear that in mind and factor that in as part of the costs of doing business. Somebody yesterday was making that comment.

But the cost of customer service is a cost of the business. Well, if businesses are now looking at the ease of access to the internet marketplace, then one of the factors that they need to put in is if I'm trying to sell my goods or services to somebody in a foreign country, customer relationships, how do I develop them? How do I develop the trust that those customers can come to me as an alternative to other suppliers? These are all factors that I think will call for a hands-on, case-by-case approach to dispute resolution.

In terms of the role of government in that process, I simply don't believe that it's appropriate for government to prescribe in any shape or form the appropriate outcome for consumers at this stage of development. Certainly I think you will find if you ever venture into any of the Australian publications, it's very much a hands-off approach to supporting, with guidance, with education, in supporting with perhaps usage of endorsements and with codes of conduct and so forth, but not actually prescribing what businesses ought to do in this area.

MS. WELLBERY: Thank you.

Scott?

MR. COOPER: Let me just say this has been a very helpful set of panels, and I think a lot of very important information is coming out, but I was especially impressed by what Diana Wallis was saying, and I think I'm paraphrasing her correctly in that we need to get back to first principles here and that I think there's a lot of issues we can talk probably endlessly about, including sort of competition, model, about how we make sure that a thousand ADR systems bloom, you know, around the world or the more structured legal framework issues, how we make sure that the arbitration system, perhaps, has a way to fit

into all this.

But I'm not too sure that that's really what we should be discussing at this point. I think those kinds of arguments are more theological arguments, when I think what we should be doing is saying how do we get from here to there? How do we set up an ongoing, working infrastructure for ADRs? And I think your question gets right to it. I think that it's going to depend upon not only an ADR buy-in by consumers and businesses but also the code that fits with it, and I think the infrastructure behind that, which I think is the seal programs.

And I think that until we can actually show something on the ground running that actually will start developing, making mistakes, correcting those mistakes and actually helping out consumers in the real world, I think it's going to be very hard to get beyond sort of the endlessness of debates that we can have I think about some of these other issues. I don't think that we want a thousand flowers blooming in this field, because it's just going to confuse consumers, and I don't think that a binding arbitration system, mandatory, binding arbitration system, is necessarily where we want to start either, because I think the real question is how do we get consumer confidence in this

market, in this very new market, and that is I think ease of use and utility of an ADR system.

I don't think that arbitration, per se, is likely to lead us there, and certainly we are going to run into all kinds of problems jurisdictionally I think around the world. So, I would hope that as we continue these discussions within the breakout groups that the question we really want to look at is how do we get these things up and running in the real world as quickly as possible so we can start making mistakes and then correct them.

MR. BODOFF: Well, I certainly appreciate the opportunity to be here today. I guess I'm a little in awe of all the people here with the legal backgrounds that I don't have and the expertise in ADR that I don't have, and I guess the one thing I can bring to this discussion is the opportunity to actually administer the largest trust mark program on the internet today, and with that, there are some specific recommendations I would make when we look at what we think government can do to help promote private sector seal programs.

But when we talk about private sector seal programs, I like to reinforce a statement that we often make that we consider it like a three-legged stool, and there are three key components to a seal program that

makes it real. Number one, a trust mark that is well recognized and represents something that consumers can believe in and have trust in. I think that's why we call them trust marks. A program that has behind it standards, business codes, that really demonstrate what that trust mark means, and with that, the third leg of that stool is a comprehensive dispute resolution process.

So, in making recommendations -- you know, what we would recommend for government to look at is, number one, I think encourage discussions on the topics, such as you're doing here today and such as the European Commission did in its March workshop, is let's foster the discussion. We're going to need new technologies and new approaches to be able to respond to the needs that we're identifying online, and we need the forums to foster the discussion.

Number two, help promote and educate consumers and businesses on benefits of ADR. I mean, we find when consumers are given the opportunity to have consumer friendly dispute resolution processes available to them, they take advantage of them, and they're beneficial to consumers. Help us educate businesses.

I know when we launched the BBB Online program,

one of our greatest challenges in initially getting companies to commit to the program was not the marketing side of the company. Marketers wanted to sign onto our program, but our program has comprehensive dispute resolution criteria, and we had pull-back from the corporate attorneys or outside counsels who were concerned about the criteria -- you know, the additional criteria that's being placed on the company and a commitment being made, and I think we're seeing that eased up, because our program is growing significantly, but I think there's an education process that's extremely important, and we need to get out to small and medium-sized businesses with that education process, because they really do make up the heart of online commerce.

Number three is we would encourage governments to treat promises to adhere to standards and to participate fully and fairly in third-party dispute resolution programs as warranties and treat alleged breaches of those promises as deceptive business practices.

And number four, we would urge governments to rigorously monitor trust mark programs and take action against deceptive trust marks that do not adequately inform customers what they stand for and then do not

deliver on the claims being made, and hopefully governments can figure out ways to cooperate in international law enforcement against deceptive trust marks and unfair ADR. It is difficult enough for consumers online, particularly when they're dealing in cross-border situations, to decide on who as a company that they want to trust and engage in the commercial transaction with, to let alone then figure out who are the trust marks that they can have faith in. And anything that can be done to help build the awareness of trust marks that are able to stand behind the commitments that they're making is going to be very important.

MR. STEVENSON: Scott, used the -- that you didn't want necessarily a thousand flowers to bloom, and I think before we get maybe the answer to the question he poses, do people agree with the basic approach or question that he's asked, the well-ordered garden approach? Is that the one that's going to be more attractive to consumers than the thousand flowers?

Is that too lost in --

MS. WELLBERY: I'm thinking of putting it into English garden versus French garden.

MR. STEVENSON: French garden, okay, there we go.

Well, Tim Fenoulhet, why don't we ask you, then, which gardening approach you prefer.

MR. FENOULHET: I haven't put my green fingers on today, but no, I'd very much support by what is being using said by the two previous speakers. I think it is very important that particularly the online variety of ADR systems --

MS. WELLBERY: Tim, could you speak into the microphone?

MR. FENOULHET: I'm sorry, I was saying that I very much support what was said by the two previous speakers in that first of all, particularly for the online variety of dispute settlement systems, really the time has come now for them to be properly tried and tested so that we can actually prove this, that they are effective, particularly for settling cross-border disputes, and also I think that from our perspective in the European Commission, we see ADR as one element in an overall package of measures that are necessary to create eConfidence, consumer confidence on the internet. Trust marks and codes of conduct and ADR are all inextricably linked, and they need to be considered together as a wholesale package to achieve that confidence.

Turning back to your question, I think that one

should remember that one of the reasons we're here is because the internet, of course, does present some very major and significant challenges for rulemaking or setting the rules of the game, if you like, whether it be governmental regulation, existing legal frameworks or, indeed, for self-regulation. First of all, the multi-jurisdictional nature of the internet is a terrific challenge to us all, and this is really I think the point of departure for our interests, particularly in the online variety of dispute settlement systems.

And of course, the internet is very much a market-led environment, it is moving extremely fast, and this makes it very difficult for legal frameworks to adapt to the technology, to progress made in the technological field, and also for policymakers to keep up with the developments in terms of setting the rules of the game.

I think this has given us cause for some thought and reflection on what should be the best approach in this area, and as I say, I don't think it's a real coincidence that we're turning increasingly to some form of combination between market-led self-regulatory initiatives with some form of cooperative approach involving governments who may to

some extent provide either guarantees or some form of acknowledgment to certain self-regulatory schemes, or indeed, to encourage dialogue between the stakeholders, and this is extremely important, especially for consumers and consumer groups who are perhaps not inclined to turn to self-regulation as their main solution to these problems.

And I think the presence of governmental bodies, simply encouraging the different stakeholders to come together, to develop a consensus-based approach which can combine market-led self-regulatory solutions with some form of acknowledgment or recognition from the governmental side, can go a long way to creating this necessary confidence.

This is something that we are trying to pursue in the European Commission through a group that we have set up involving the different stakeholders, businesses, not only in Europe but also from the United States and elsewhere, and also involving consumers to precisely look at the needs and requirements for trust marks, codes of conduct and also for alternative dispute resolution, to look at these schemes, because one of the lessons that we learned from our own workshop in March, and this came somewhat as a surprise, was that the stakeholders who took part in

that workshop were actually looking to us to not only encourage them to get together and to develop this consensus-building process but also to provide some sort of guidance and incentives, to look at this issue, for example, of the proliferation of trust marks, which can cause confusion not only for consumers but also for the small companies who are embarking on the internet adventure and do not know necessarily which trust mark scheme to choose, which is of the best quality, which is the most appropriate for their particular sector and so on and therefore some form of reference point or benchmark seems necessary. This is something that came as a result from our own reflection on our own workshop on this.

MR. STEVENSON: Mark Budnitz?

MR. BUDNITZ: I think that seal programs are one important element that should be looked at very carefully and hold a lot of promise, but if there are lots of different seal programs, trust marks and so forth, the consumer will just end up being more confused and will not know which ones to actually trust, and there will be a free marketplace of these programs with a race to the bottom for those companies which are unwilling to go and conform to strict standards. And so it ought to be a garden but an

ordered garden.

Who can make that ordering? I think the government is the one that can make the ordering. Now, there's all kinds of problems in reaching a consensus among different national groups, but the European Commission has come out with principles to govern out-of-body -- out-of-court, rather, out-of-court settlement of consumer disputes, and that provides a framework. There's codes of conduct that the European community has come up with and others, as well. So, there's a minimum base standard that government can provide.

Secondly, government can be enforcing those companies that have agreed to certain standards to make sure that they do, but in addition, I would say that the governments should be providing consumers with the right to go and sue, as previous speakers said, treat these as warranties, treat them as deceptive practices, but also allow the consumers to go in after these companies, because the governments are not going to have the resources -- the enforcement agencies of the governments are not going to have the adequate resources to go after them, all of them, and so you need to provide tools for consumers.

I just want to mention quickly one other

element that may be an important one that was mentioned this morning. All of this talk really I think is wasted time unless there's a way of enforcing the arbitration awards or the mediation settlements or whatever, and so insurance is something else that should be seriously considered, some kind of insurance scheme or pooling scheme so that if the consumer wins, the consumer gets something at the end, whether the business wants to comply with that award or not.

MR. STEVENSON: Just to follow up on the quick point about the -- I think Russ had made this point, also, when people are not complying with advertised ADR procedures, whatever they might be, the suggestion's been made about that that be treated either as a, as Russ suggested, breach of warranty or a deceptive practice, various approaches there, but is there anyone who has a problem with that general concept of addressing the program that does not live up to its promises in that way? Is that problematic for anybody?

MR. SKEHAN: I don't have a problem with it, in fact, I think it's a very important part, but I'm not altogether convinced that the governments should have to preset what those standards should be.

MR. STEVENSON: I guess I was asking first the question of just what are the standards, and is there a

problem if people don't comply as advertised.

MR. SKEHAN: I agree with that. I think the prime role for governments is to make sure that -- coming back to the metaphor of the gardens, that the packet of seeds, it is clear in how the seed is to be planted, and secondly, that the governments need to make sure that the plant actually comes up as advertised. I think those are the two most important parts, but not to dictate what sort of the seeds can be sold. I have a problem with that. I really don't think that governments should preset the standards or codes of conduct or trust seals or ADR.

I do think that they should monitor the market and the market should be very clear in the description that consumers see of any ADR scheme and that what they see is what they get, and I think the governments have to come down very hard on companies that offer seals and programs which don't actually do that.

MR. STEVENSON: I appreciate your following on the gardening topic.

Catherine Kessedjian, what is your approach to gardening?

MS. KESSEDJIAN: Well, you ask that to a French woman, and if I am not mistaken, L'Enfant has done quite a number of work in this town, and also L'Noutre

(phonetic) has been also very active in gardening, but that's not my taste, I will assure you.

First of all, let me thank the FTC and the Department of Commerce for inviting the Secretary out of the Hague Conference to be presented here. I think it's very important that whatever is done at the international level of unification or harmonization of private law, private international law, would be in conformity with what we call in our field party autonomy, and the reason I raise my flag for this very question is actually to say that whatever efforts is done internationally at organizations such as the Hague Conference or ANSI Trial or Unidraw (phonetic) is actually done to facilitate, to facilitate commerce, business, economy, and not to prevent it, and that's very important.

Just to give you an example, in the project that I'm in charge with, it is jurisdiction and enforcement of judgments. So, everybody says, oh, my God, this is litigation, and it's going to be, you know, something that we don't want to hear about, but in that particular field, there is also a large area for party autonomy, and a very symbolic aspect of our project -- it's more than symbolic, I think -- is that the choice of court rule, if agreed upon, that will

allow businesses all over the rent of countries who had to deal with this project to actually know in which case their choice of court clause is valid or not valoid, which is very important in terms of credibility and certainty.

This is in Article 4 of the convention. If you look at what has been done in European law, in 1968, it was in Article 17 of the convention, of the Brussels Convention. So, you can see that there is a completely shift of perspective, and now it is -- governments doing international unification of private law are really saying, okay, you do what party autonomy allows you to do and to the fullest extent.

Now, one thing, and I will stop here for this very issue, but one thing that we have not been achieving so well in this project is the consumer side, and unfortunately, at present, the consumer provision in the draft convention is still old-fashioned and old thinking, and, in fact, we have been progressing in informal meetings to come to a better understanding of what we should do, and if you allow me, I will come to that later on.

But I was just wanting to get the first word on, you know, party autonomy is very important. States and governments are actually doing this in the

international field, so it's really a project that is accepting the idea that companies and the industry and businesses should actually to the fullest extent of party autonomy, and that's very important for e-commerce.

MR. STEVENSON: Okay. Ed Mierzwinski, if I could call on you.

MR. MIERZWINSKI: Thank you, Hugh.

I just wanted to respond briefly to your question do we have any problems with treating violations of the seals as unfair trade practices and warranty violations. No, of course, we do not, and consumer groups would feel that at the bare minimum, we need to make violations of seal programs a violation of law or warranty, and as Mark Budnitz pointed out, we also need to make sure that consumers retain a private right of action, that agency enforcement is in our view a first step but not the only step that needs to be taken.

I think it's instructive that the Federal Trade Commission recently unanimous -- I'm sorry, it wasn't unanimous, but the Federal Trade Commission recently came out with a report finding that voluntary regulation of privacy was not working on the internet and that the agency was now calling for enforceable

rules, and I think that that logic translates very well to the consumer protection side.

Thank you.

MR. STEVENSON: Well, one of the tricky issues, what I'm hearing, is that people don't have a problem necessarily with treating the advertised ADR promises as deceptive if they're not lived up to, but I do hear some differences of opinion on what roles people should play in coming up with those various standards. I think, Paul, you were advocating less intervention on that.

Linda, maybe you could speak on that issue from your perspective regarding the NASD.

MS. FIENBERG: Yeah, I'd be happy to. I think, looking at the ADR side of this, for a consumer group, I think there are many, many perils in establishing such a program. The NASD is an unusual sort of animal, because our program is industry subsidized. Industry pays about 70 percent of the costs of our arbitration/mediation forums. The parties, the consumers, pay about 30 percent when you look at the total picture. And we are heavily regulated by the Securities & Exchange Commission, and the GAO also is involved in oversight.

Nevertheless, the perception issues and

assuring the consumer, in this case investors who bring cases against broker-dealers, that that process is fair is really fraught with dangers. I've been at the NASD now for four years, and I probably spend as much as 25 percent of my time just dealing with perception of fairness issues, and how you are going to establish rules that deal with who will establish the rules, who will oversee them or approve of them to make sure that they're fair, who will set up the arbitrator and mediator rosters, and once the industry assumes that responsibility, you build in a perception that it's not fair.

Who will pay for it? When you channel a consumer into an ADR program instead of into court, those of us who have dealt with litigation can explain all of the reasons why it's cheaper for the consumer, but at the end of the day, the consumer can walk into court and just pay a filing fee. In order to support an ADR program, someone has to pay for that, and if the industry pays for it, then you're subject to the argument that it's not fair because the arbitrators will play to the hand of the industry because they want to be chosen again. If the consumer pays even as much as half of it, you'll have the argument that this is too expensive.

Who will enforce an arbitration award? Now, at the NASD, that's somewhat easy. If a broker who is still in business doesn't pay, the NASD will take that broker's license away. So, there is an automatic enforcement mechanism, but in the sectors in which you're talking about, that doesn't really exist.

Who will publish the decisions or will they not be published? Will they be available for people? Will the consumers get to have as much of a say in selecting a mediator or an arbitrator as the organization you're setting up? And all of this takes a lot of structure and a lot of -- there are just a lot of issues with respect to perception, made more difficult, I believe, if the system is mandatory. This is a major issue in securities field.

Neither the SEC or the NASD require that investors arbitrate or mediate disputes; however, it's very difficult to open a brokerage account today, particularly one that's a margin count and an option account, without agreeing to a predispute arbitration agreement, and that colors a lot of the perception of it being unfair, even though investors win in over 60 percent of the cases in which they file in our forum and settle a large number.

So, I think what you're setting out to do is

really laudatory. I just think it will be a very difficult process at the end of the day to have people believe that this is a fair process.

MS. WELLBERY: To follow up on all that you just said, have you found any particular solutions to the many questions that you've raised that seem to operate or to help create not just the perception of fairness but real fairness?

MS. FIENBERG: Well, we believe -- I strongly believe that the process is really fair, and we have all kinds of indicia of that, as well as the SEC and the GAO oversighting our programs, and they believe they're fair. The main issue we have the perception issue is something I think you'll be able to avoid, which is that in a three-arbitrator panel, which we have in our larger cases, one of those arbitrators is from the industry, two are non-industry or public, and the fact that one of them might be from the industry lends to some people's mind a perception of unfairness, even though most of our decisions are unanimous, and as I said, customers win in over 60 percent of the claims that are filed, many of which they would not win in court, because the arbitrators are there to do equity and not to strictly apply the law, and that in most cases works to the benefit of the investor.

But we don't have all the answers. We're working on it. We have changed our rules substantially in the four years that I've been there to give the consumer a lot more say in the formation of those rules, even in addition to the existing SEC comment period, and we have reached out to all kinds of investor communities to involve them at the very initiation of our processes rather than waiting until we file something with the SEC for comment, and that has made a big difference.

It's easier for us to mobilize that group than it would be for you, because we're talking about a single industry sector, and there is now a very, very active bar of people who represent investors in securities arbitration and mediation, and once that group became a formalized group, it allowed us to reach out.

MS. WELLBERY: Thank you.

MR. BODOFF: If I could respond to the question about who should develop the standards, and I certainly agree with Paul that I think it's something that the private sector should do, and if I can, let me give you an example of an activity that we are just concluding, because I think it does demonstrate how something very positively could be done and where we want to go with

it, and we are just concluding in the Better Business Bureau system the development of a very comprehensive code of online business practices, and we have done it in a very open consensus process, having it up on the internet, three different revisions of the document, and we have received over a thousand comments to the code from all over the world.

We have had focus group meetings around the country. We have sat down with representatives from Federal Trade Commission, Department of Commerce, to get input into the document, and just this week, the document was approved by the board of the Council of Better Business Bureaus and the BBB Online board, and it's going to our Better Business Bureau system for a vote, and when we approve it, it will become part of the membership standards that we have that will impact 280,000 businesses.

But what we've said in approving this document is it doesn't stop there. We should be open to revision, and when I say that, it's because we know there is very positive code development efforts taking place in Europe and other areas of the world, and what we really look forward to doing is figuring out ways to harmonize our efforts and bring these codes as close together as possible, because that's how I really think

we're going to serve the global community and the global consumer when we're all operating under very similar standards, and then consumers in any cross-border transaction are going to have a common understanding of what they can expect.

And I think government here can play roles as a facilitator, and if you can allow me just one other example, because I think it's positive, it's just three weeks ago we entered into an agreement with an organization in Japan, JIPDEK (phonetic), which is the major privacy trust mark program in Japan, where we will roll out in the fall a joint seal initiative.

What it means is -- and we will harmonize our standards, our dispute resolution process, so a consumer who is doing business with an American company or a Japanese company, whether in the United States or Japan, you will have similar criteria that that trust mark stands for similar standards and a similar dispute resolution process, and if we can figure out the way among the various trust mark organizations around the world to do that type of approach, where we can figure out some way of coming together and harmonizing our efforts, then I think we're really going to be able to serve the global consumer.

And I know MITI was very instrumental in Japan

in helping push those negotiations, to move them forward, because they saw a benefit to the Japanese consumers and the Japanese industry, and I think that's something governments as facilitators, with the various trust mark organizations, has encouraged, that type of cooperation.

MR. STEVENSON: Would the panel agree in the value of -- well, for whoever's developing these guidelines as Russ is suggesting, the value of harmonizing them across borders, I guess is what I'm getting at? I'll ask Tim Fenoulhet that question.

MR. FENOULHET: I think it's important to stress here that in Europe what we're trying to do is to encourage and facilitate this process of developing minimum requirements for these systems and stressing the fact that what we would like to see developed in the marketplace is very much a combination of measures, as I said earlier, linking the trust marks and codes of conduct, with the ADR systems. So, we see the three as being very closely linked, and that's something that we're very much encouraging.

And it's really not a question of governments coming in and introducing standards. What we're looking to do is to encourage the stakeholders themselves to develop very baseline standards or

minimum requirements, if you like, which are very much the common sense principles that I think there's already very much an existing consensus on those.

And it's also, to respond to your question, at international level, since we are -- and I think, you know, we can never over-emphasize the point, but it is extremely important that we bear in mind the global dimension, the global implications of this, that there is some degree of understanding between these principles, and it's going to be very difficult to reach any agreements on very detailed or specific rules or legal frameworks of harmonization to the extent, of course, that's being achieved with some difficulty, but also with some success, within the EU context.

I think obviously it's going to be practically impossible task to achieve that at the international level, but what can be pursued is perhaps looking at and understanding baseline principles of the kind that Russ has just evoked.

MR. STEVENSON: Commissioner Bhojani, is that approach that Tim just outlined consistent with what you've been doing in Australia or different or what's your reaction?

MR. BHOJANI: It's slightly different in the sense that the Australian situation is we do rely very

heavily on the private sector to set standards. If I can illustrate it with two examples, there's an organization, private organization, known as Standards Australia which has produced two standards, one on complaints handling and one on compliance programs, which are now gaining extreme recognition in industry and commerce as objective, fair and so forth.

The value of these processes are that they are inclusive. It isn't an exclusion of government from standard setting, but it is inclusive. So, the governments are at the table when these standards are debated, discussed and put out to the community for comment in draft form, but it does involve, as I say, the inclusive process of all stakeholders, consumers, businesses and governments, but the end ownership is a private sector result. It's not a government standard imposed by governments. I think that's where the issue really does come to a head, as to whether who owns the standard of the end of the day.

And on an international basis, I perhaps would even refer to the ISO 9000 series of standards on quality issues. Again, is there scope for that sort of issue to be developed in this area?

At the end of the day, I think the focus does need come back to the purpose of these dispute

resolution mechanisms and the ADR processes, but they are part of their businesses' toolkit in establishing confidence and trust, so that the only issue of these standards or ADR mechanisms, the seeds, whatever you'd like to call them, has at the end of the day got to go back to the private sector.

And could I just make a couple of comments on the role of government in facilitating the seal programs? I agree wholeheartedly that the enforcement agencies, particularly like the ACCC and the Federal Trade Commission, dare I suggest, do have a major role in helping support these sorts of processes by their enforcement and vigorous enforcement action where people are misleading the community, whether it be the local community or the international community, in relation to the use of such standards or compliance programs or ADR programs.

I think if there isn't any confidence within the international consumer community that when people are being misled or deceived about the use of ADR mechanisms, that nobody is there to enforce them, there is going to be a very quick race to the bottom in terms of the effectiveness of these seal programs. So, I think there is a major partnership that the enforcement agencies can play in enhancing the value of these sore

of seal or trademark or certified programs.

MR. STEVENSON: If I may, to paraphrase and see if I'm following, I take it that you see some value in the international harmonization, although what you're saying is the product is more the private sector product than perhaps Tim was suggesting?

MR. BHOJANI: Yes, that certainly does -- I got the impression, perhaps I was wrong, that it was more of a desirable approach from government to set the standards, and therefore, in a sense to impose those standards on the business community and the consumers community, in that sense, whereas the approach in Australia would be to encourage the development of these standards, to be at the table, but to encourage ownership of the standards in the private sector rather than the public sector.

MR. STEVENSON: Maybe, Tim, you'd like to clarify or --

MR. FENOULHET: I'm always a little baffled by this issue, because obviously in the European Union where we're used to dealing with different cultures and different languages, one can expect some degree of misunderstanding to emerge, but here, you know, where we're all speaking the same language, I find it a bit surprising that when I was saying this, in fact, in the

European Union, what we're trying to do is encourage and facilitate the private sector and the stakeholders, consumers and so on, to develop these baseline standards on a voluntary process. I don't see that as being a government -- government ownership of those standards.

MS. WELLBERY: Can I raise two questions to follow up on both what you just said, Tim, and what you said? First, how do you ensure in the European situation that you have all the stakeholders at the table? And then I'm curious about what role the government of Australia plays in your process.

MR. FENOULHET: Well, what we proposed following our workshop in March was not only to set up quite a small group, in fact, representing different stakeholders in a way that we felt was representative both from a sectoral perspective but also from a geographical one, as well, but we also proposed to establish an online forum or a portal website which would ensure that the process was very inclusive and open to all those interested in contributing to this consensus-building process and to be involved, if you like.

And we saw that issue as a very fundamental part of our proposal in the sense that on the one hand,

it would ensure a very inclusive process, a very open one, but also, as Barbara is implying, it is very difficult to ensure that all stakeholders are involved and represented, and we saw this as a way of encouraging groups not only within Europe but elsewhere, in the United States and other regions, to also play that part in developing some form of coordination so that at least there is, as I say, some form of understanding in the different initiatives that are cropping up around the world.

MR. BHOJANI: The Commission -- I'm sorry, the Government of Australia plays more of a role in terms of the complaints and the experiences it has in relation to particular areas. If I can illustrate it with the two standards that I was referring to, the ACCC's predecessor, the Trade Practices Commission, as it was then called, was at the table to try to discuss the role of compliance programs or complaints handling programs based on the experiences that it had as part of its enforcement activities and the deficiencies that it saw as a part of that process, to contribute to the table with that experience and that dialogue from the database and the information that it had on a generic basis rather than on a more specific case basis, and I would expect that that would be the same for other

standards, where appropriate government agencies that do have information that can assist in the formulation of identifying the problems, to develop the standards and contribute in that process.

MS. WELLBERY: Thank you.

MR. MIERZWINSKI: I just wanted to say briefly, I like the idea of baseline or minimum standards better than harmonization, as well. I don't know that harmonization is achievable, because I'm concerned that harmonization might end up with a floor that's too low, and consumer groups would be concerned that we would not be able to raise the bar and improve consumer protection.

I think it's something you can achieve in international agreements on how to test for tire safety or something to do with a specific kind of product, but I don't know that it's achievable in this context. So, I think we would support from the consumer perspective minimal or baselines.

MR. STEVENSON: And would you make that comment specifically about ADR? I guess we have been talking more generally.

MR. MIERZWINSKI: About ADR and consumer protection standards generally, yes.

MR. SKEHAN: I have a general question, and I

may have missed this, but being one of the stakeholders in this group in Europe and being involved for the last while, I feel I have a reasonable idea of what the European approach to this whole debate will be over the next six months, and there are various things happening, and they have been outlined today by Tim and yesterday by John Bell. I'm less clear in my own mind about the American official approach, and I hate to turn the tables, but I wonder what the FTC sees as its kind of game plan over the near the future, because it seems to me you have in Europe now this portal site which will be opened up which will invite a lot of comment.

What I've heard over the last two days is a great deal of expert commentary from American participants, and I wondered whether a kind of replica site in the FTC which was widely advertised would not gather a lot more information and everyone feeds from that information. I would welcome any comment from the FTC as to what the game plan is in the future.

MR. STEVENSON: I always wondered in conferences whether someone would do that, turn it around. Actually, I guess there are two answers, one more general and one the more specific. I think that -- and Barbara can comment on this, as well, but I

think from the U.S. Government point of view, we've been looking to collect the information on where we should be going from here, and we really do want to try to get -- that's one of the things we're aiming for obviously in this process is to collect the information on where other people think this process should be going, and indeed, we have been listening to stakeholders here -- actually, I might take this occasion to thank Scott Cooper and Frank Torres, Scott from Hewlett-Packard and Frank from Consumers Union, who had put together some meetings leading up to this workshop talking about how do we make these things happen, how do we build consumer confidence here, and I think that was a valuable vehicle also for identifying the stakeholders in the process and the people who had something to contribute to that process.

A more specific comment, actually I believe the website is not yet up, I think John Bell said it was going to be up very soon, and I think that's something maybe we should explore, is how do we collect that information. We obviously -- our process here is to try to be very open about getting as much input as possible, and, in fact, I plead with you again all to file comments, and we have extended the comment period, and we would be interested in hearing further views

that people have, especially after listening to the various insights that people have had here.

MS. WELLBERY: If I could jump in, because the U.S. Government at this point is not a monolithic -- of course, the Federal Trade Commission is an independent agency, and the Department of Commerce is part of the Executive Branch. And I agree with you that at this point we are gathering information, but we also start with the basic administration policy on e-commerce that we articulated almost three years ago in the President's framework document where we espoused five principles.

I'm not sure if at this point I can recapture them all, but a major -- the major thrust was that there -- we should let the private sector lead and there should be minimal government regulation when government regulation is called for. So, I think for us there's a strong disposition against wading into this marketplace unless and until we see that there is a need for it and unless and until we see that the private sector has failed to take the leadership role that we espouse and hope that they will take.

Certainly what I've heard in the last day and a half has just impressed me with the wide variety of both possible mechanisms and views on all of these

issues, and so mostly what I'm dealing with right now is that there's just still a very wide variety of views, and we are very much at the beginning of this discussion.

MR. STEVENSON: So, that's what you get for asking.

Maybe we could move on at this point to one of the other questions here. Catherine Kessedjian had touched on the Hague Convention issue, and Catherine, maybe it would be helpful to describe what the consumer protection issue is that has been raised there.

MS. KESSEDJIAN: If I may start by giving you a piece of information that may not have come to you all yet. Three weeks ago in The Hague we had one of our meetings that are called special commission on general fields and policy, and there it was decided that instead of convening the diplomatic conference in this autumn, we will actually convene the first part of the diplomatic conference in June 2001, which gives all of you who have comments and who want to continue the discussion and consultation process with the Secretariat of the Hague Conference and particularly with your own governments still have time to do so.

The idea behind that is that we actually need more time to discuss about issues such as consumers,

and I will limit my comments to this particular issue in this forum, but obviously there are many others, and I would be happy to discuss that with any person that would want to take up that with me afterwards.

Basically we are -- well, let me say first that the Hague conference, although it is an international, global or wants to be global organization, it is still a very small organization. We only have 47 member states and six in the process of becoming new members, but still, the European countries are very much a dominant part of the history of the conference, and although we have member states in all parts of the world, it's fair to say that the European views very much prevail from time to time and on this issue particularly in consumer protection.

The vision that we have now in the draft that you can find, for those of you who have not been following our work, you can find that on our website, which is www.hcch.net, the draft provides something which is very similar to the European conventions, Brussels and Nagano that Diana Wallis alluded to earlier today.

Unfortunately, I don't think this provision actually faces the real issues that e-commerce and internet in general have renewed. It's not new issues.

They're just the old issues, but internet and e-commerce have just given a different perspective to those old issues. And one thing that I have been very interested in hearing during these two days is that although nobody has really raised the question whether or not the consumer on the internet is still the consumer in the traditional way, with the same definition and the same "need," quote unquote, for protection. This has been kind of the background, I would say, discussion, and if you heard somebody from the seven-company group that put out this press release yesterday, this was in behind the mind and so on, so forth, and I think this is the very question that we have to address when we deal with provisions such as Article 7 in draft.

And the one thing that is very European is, first of all, the definition, because we do have a definition of what is a consumer in this draft, and it's very short, but for whoever has studies European law, it is very clear that it is very much the European way of looking at this program. So, the consumer for this provision is somebody who contracts outside -- for a purpose, I'm sorry, which is outside its trade or profession.

In other words, let's say a small business,

let's say this Haggy's Cellar from Ireland or from Scotland who is now selling all over the internet, to Australia, to Japan or to South Africa, this small business who is buying over the internet software to actually manage its accounting, and this software happens to destroy everything in its computer. He loses every single consumer list, everything, so he has a major loss.

This person, this small business, even if it is an individual, again, in a small village in Scotland would not be protected by this provision. So, the question that we should ask first is whether that's right or wrong. And again, there was some discussion in the room today, and I think we should continue the discussion on this issue, but right now, the way the draft is presented to us, this person, this entity, this small business, would not be covered by Article 7.

Then another issue that came up is the choice of court clause. This is very important. I mentioned earlier that we have had a very proactive way of looking at party autonomy, but again, when you look at B-to-C contracts, this is completely different, and again, it is the European way of looking -- the old -- I should say the old European way of looking, because again, this is changing within Europe, saying that the

consumer can only accept a choice of court clause afterwards.

I am not going to tell you why it is so, there are very good reasons for that in history, legal history, but that is not the purpose of this forum.

The idea that now we are working on is as follows: First thing, the provision should start by saying that nothing in convention should be interpreted as preventing businesses and consumers to use alternative dispute resolutions. The reason why we probably need something -- and again, those are ideas that we are now working on. They are not in the text yet. The reason why we would need probably such kind of declaratory provisions, not a real drafting legislation, but declaratory provision, is that we have in Article 1 of the draft an exclusion of arbitration, and this is -- the reason why we have that is because we don't want to regulate arbitration, which is completely different field, but this has been misunderstood in some circles as kind of a word to the outside constituencies saying that we are against arbitration, and obviously it is not.

We are excluding arbitration because we don't regulate it, but we have absolutely -- we, I mean the countries who are participating in this process -- have

absolutely nothing against ADR, but if it needs to be said, then let's start the provision with this.

Then the second aspect of what we are trying to develop now, and again, this is up for discussion, is that we would probably go to provision which says that if the consumer is based in a country which laws accept the validity of choice of court clause against that consumer, then that choice of court clause would be valid.

In other words -- and I'm turning to my left-hand neighbor -- this convention is not going to make the world better for consumers than what it is now in terms of where they are situated. They will have the coverage, and they will have the protection that the law of their base allows them to have. And I think this is fair in terms of international harmonization. It may not be enough in terms of ideals for the consumers, but I think it's fair in order to do that.

And the third thing, and this is going up to what Diana Wallis said this morning, yes, is that as very default clause, if ADR didn't work, if the choice of court is not valid, then, and only for very few cases, in fact, we would have a jurisdictional clause. We would have a clause that would say then you would have to go to such and such court, and that's where

again probably we are going to go to consumer court, but this is not -- this is what is in the text right now, but it's, again, up for discussion.

I would probably stop new. If you give me just a slight opportunity, perhaps later on, on the enforcement aspect, unless you want me to address that now.

MR. STEVENSON: Well, why don't -- I don't know whether people have a reaction to this provision where the -- the current draft -- choice of court provision, I believe in the current draft, gives the consumer the choice of court in their residence, and then Catherine has outlined this other option. Do people have reactions to that? I guess it's hard to follow, but --

MR. DONAHEY: I have a reaction to choosing a court, and my reaction is one also that I had to the earlier panel, and that is, by giving consumers ultimate recourse to the court system and by preventing them from agreeing to a binding arbitration clause, I'm concerned that we're really taking away any meaningful remedy that a consumer might have, because if you take the example that Lorraine Brennan gave about buying a dress when she was up here and assuming she's buying it from a French seller, and you take the statistics that Susan Grant gave us that the average internet dispute

was $300, and you give Lorraine not binding arbitration but the right to go to court, how is she ever going to get any redress?

Assume that she happens to be in a court in the United States which currently recognizes that there is personal jurisdiction over somebody who posts a website that offers to do business with someone in the United States, which not all courts do, it's not that simple, and she actually goes to court and spends the money necessary to obtain a $300 judgment. Then what does she do with that judgment? Does she take it to France? Does she hire a French attorney? How much is that going to cost?

And let's assume that she does hire a French attorney, the French courts are not bound by the American court's determination that it had jurisdiction. That issue may have to be litigated all over again. And then how do you enforce the judgment? And then at what cost?

So, it seems to me that if you really want to protect the consumer, you give the consumer the right to invoke binding arbitration, and you have a system in place which automatically enforces an award so that the consumer can get redress.

MS. WELLBERY: Thank you.

Scott?

MR. COOPER: I'm hoping that the either/or choice that Scott just raised -- is not necessarily how we're going to end up, because I think neither of them works in the real world as far as the trans-national consumer dispute resolution, and this is I think, going back again to first principles, I think what we're trying to do is find things that work in the real world in a cost-effective, realtime way for a large number, at least in the beginning, a large number of hits to resolve.

Now, hopefully, again, if these systems work well, then we are going to find a spike of numbers at the very beginning, as has been proven with a lot of things on with the internet, and then they start to fall off because people have confidence in the marketplace. They are not going to keep testing, testing, testing. They are going to find other ways and businesses are going to find other ways, through internal means hopefully for the most part, to resolve these things.

But I think saying that it's an either/or may not address this in the right way. I think we have got to find, again, some middle ground here where we look for nonbinding opportunities and get out of the legal

framework through this parallel universe where consumers and businesses can find each other through probably third-party seal programs and mediation programs to resolve their small transactions, whether it's the $300 dress or whatever, and then if there are still problems, then fine, let's let the courts take care of it.

And I don't want to get into the argument of whose courts it's going to be and all that. I think that that is probably one that will take many, many years to resolve, and it's not one I think that should stop us from trying to resolve the easier question, at least theoretically the easier question, of trying to set up a mediation system that really is this parallel universe. So, I'm hoping that when we end up in the breakout sessions, we can start talking about how do we actually implement something like that.

MR. DONAHEY: If I could just respond, I didn't mean to suggest it was an either/or situation. I just wanted to suggest that there is a place for binding online arbitration in the present situation. I think by far preferable if you have a company like Hewlett-Packard or Dell or Microsoft, you are not going to have any problem resolving your disputes with those companies, but the companies that you're going to have

a problem with are the companies that are going to set up on the internet just to bring consumers. That's where you're going to have your problem. And to say that I'm going to let you negotiate with those companies is not going to protect you.

MS. WELLBERY: Can I just ask a question, I know Catherine wants to say something more. I guess I'm still groping for the answer to the question that Hugh posed a while ago, and that is, where does the enforcement mechanism come from? I don't see that anybody has yet come up with a solution to that issue, and I don't think, Catherine, giving the consumer the opportunity to sue in his own forum ultimately gives him or her an enforceable judgment and one that's easily enforceable. It isn't clear to me that binding arbitration necessarily gives the consumer with a $300 claim a real remedy, because they still have to go abroad to enforce it. So, I'd like to come back to that question, if I may, and maybe nobody has any answers right now in how we deal with enforcement, but I just wanted to refocus on that question in case we had gone astray a bit.

MR. BHOJANI: Can I just perhaps raise one example that's certainly not a complete answer to what you've just asked, but one illustration of a partial

solution is cooperation between law enforcement agencies. If I could illustrate it with the example with the cooperation between the Australian Competition and Consumer Commission and the Federal Trade Commission on one specific case, where there was some misleading and deceptive conduct aimed towards consumers who were wanting to set up on the internet themselves in terms of registering domain names.

There was misleading conduct by a company that had set itself up in Australia as internic.com, and it was internic, N I C, lower case, as distinct from INTERNIC, N I C, capitals. So, confusion reigned, and they were charging a higher amount, two people who wanted to register from the Australian end of the spectrum. A cooperation arrangement between the Federal Trade Commission and the ACCC was able to resolve that with the ACCC taking an action and obtaining a judgment in the courts in Australia and then being able to get an outcome in which a pool of money was set aside, $250,000, to have a refund for consumers in over 11 countries around the world, most of them in American but including Europe and elsewhere around the world, to distribute sums of $250.

Now, it's not something that individual consumers could possibly be contemplating taking as

legal action themselves, but there may be some scope where there is reasonably large-scale conduct affecting a number of consumers in a number of organizations where cooperation agreements between enforcement agencies to achieve some degree of redress for consumers.

MS. WELLBERY: Tim?

MR. FENOULHET: Yeah, I don't know if this will answer your question, Barbara, but I just wanted to perhaps point out that what we hope, of course, in this area is that it will, in fact, be the internal complaint settlement systems and voluntary systems, voluntary programs of mediation and so on that will actually be the most popular form of dispute settlement, where the parties voluntarily agree to participate, and, of course, the enforcement issue, which normally wouldn't actually crop up in that situation. I think it's obviously too early to say now to what extent binding arbitration or more formal dispute settlement systems, to what extent they will actually be the most popular, but my question guess is that it will be -- by encouraging effective business practices of a very high quality, which businesses can see is very much in their interests on the internet, and also through mediation and conciliation, that, in

fact, the enforcement issue would perhaps be less important. These more voluntary systems are likely to settle over 90 percent of the cases I would have thought.

MS. WELLBERY: So, to build on what somebody said earlier today, to worry about trying to find a solution or trying to find a solution that deals with the great bulk of the cases and not worry at this point so much about the outliers. Russ, would you agree with that?

MR. BODOFF: Yes, certainly. I think there's a responsibility of trust mark programs when they have companies who are not complying with decisions that come out of the dispute resolution process to pull a trust mark, and as trust marks gain more visibility and consumers seek them out, then companies feel pain if they're not displaying them, it's also to publicly recognize companies who are not following up on commitments, which our organization has historically done, and when appropriate I work with the appropriate regulatory operations.

We have had, for example, a very, very effective program self-regulating national advertising in the United States for 30 years, and a good part of the teeth in that program is our relationship with the

Federal Trade Commission, and when we have noncompliance, is turning it over to the Federal Trade Commission, the Federal Trade Commission giving it a high priority to take action. So, there's certainly various steps that can be taken, but the heart of it is a trust mark program being sincere, and that is if you're issuing trust marks, you've got to be willing to act and pull a trust mark if you find noncompliance with decisions.

And I guess I could say, in our program, in our reliability program, and it's a little over three years old, we have pulled a dozen trust marks over those three years for a variety of reasons.

MR. STEVENSON: Russ, what would you say promotes trust in the trust marks? How does one promote trust in the trust marks?

MR. BODOFF: That's a good question. I guess it's having the right standards and the commitment to stand by them and standing by them. If you're going to have -- if you have standards and you review the companies against the standards and those are the only companies that get into your program, I think that's an expectation that the consumers have.

The problem is -- I mean, there are a number of very good trust marks on the internet. There are a

number of trust marks that are no more than business opportunities that have been set up, companies who are selling seals to various companies with no great infrastructure behind them to do something, there is no checking or anything taking place. I think consumers are going to have to make decisions, and I think it's just going to be a matter of time as that washes out, as the trust level is built.

The danger, of course, of all of that is consumers who get burned, and consumers who get burned because they have seen a trust mark and then the company turns out to be bad and then they go back to the trust mark program and they find out there's no recourse there, they sort of get turned off to the whole idea of trust marks, which is one of the reasons we raised the issue that there really has to be some -- look, if trust marks are going to make promises, that governments are looking to make sure that they're living up to those promises.

The other thing that we have not talked about much is when you get into an arbitration, that's a so -- you almost fail, because at that point in time, you have got a consumer who's unhappy, and one of the great roles that trust mark programs can play is really driving good business practices online, and certainly

one of the things that we have seen, and we reviewed about 8000 websites to date, that in about 13 percent of the cases, we have seen a problem in the website, and we have almost 99 percent compliance in getting companies to make changes to some practice that they have on the websites.

I think in many cases there's a lack of sophistication among a lot of the new businesses who are coming online, and as trust mark programs, business organizations and even government agencies expand the education process and help businesses understand what good business practices are online, I think more companies are going to be responding and doing the things they need to do to respond to these type of disputes early on.

The other experience that we have in our organization, while we get large numbers of disputes and the internet has certainly shown that you will get increasing numbers of disputes, because the internet makes it so much easier for consumers to file disputes, is that the vast majorities get resolved when you get the consumer and the business of talking together. So, when you get down to those that really get into a formal mediation or arbitration, it is really in the very small numbers, and I think those are the things

that we always have to keep in mind, and we should be doing all the steps up to that to make sure that that doesn't happen, and when it does happen, then that's when we make sure that we have the practices in place to assure the consumer that it all does go bad, there's a way of protecting them.

MS. WELLBERY: Catherine, did you have something else you wanted to say?

MS. KESSEDJIAN: I just wanted to say that it is not an either/or situation. It's must be sold -- and again, this has been said many times -- it must be sold as a package, and let me tell you that in terms of the package for enforcement, we have to think in three different ways, in three different directions, because we have basically three different kinds of enforcement -- or documents to be enforced.

First you have settlements, second you have arbitration decisions, and third, judgments, and all of those three internationally, and I'm speaking internationally, because that's my background and that's what I'm trained into and I've been practicing into for many years, these are dealt with very differently in international settings.

The settlements, usually until -- until the very dates, settlements have not been trans-nationally

enforced unless they wear -- and here I am lacking the English word -- the French word is the "omiligei" (phonetic) by the courts. In other words, you need to have a judge to say this is a settlement, and then you can enforce, but a settlement that is obtained by ADR, private means, right now is not enforceable.

This is going to change within Europe, because Parliament's conclusions for the new regulation that is going to change Brussels Convention is proposing such a system. So, a settlement by some agencies, private agencies, may benefit from the enforcement power of the new regulation. This is not yet accepted, but it is the Parliament proposal. And we would basically take this into a The Hague project to actually see if it works and also within The Hague project.

On arbitration, my point is there is that we have to work on the New York Convention of 1958. In the New York Convention, you have two problems. You have, one, the commercial -- so to speak commercial exception, and I think, if I'm not mistaken, the United States have said that they only are going to apply the New York Convention on commercial awards, and that's a problem with enforcing consumer awards abroad. So, my point here would be that countries who have made -- and France, by the way, have deleted this exception. So,

my point would be countries should actually delete the exception, the commercial exception, so that consumer awards can be benefiting from the New York Convention of 1958. And there is the problem of the validity of the arbitration, also we have to work with that.

On the judgments, we have The Hague project globally, and I think we should make sure that indeed all the hurdles in getting enforcement abroad of judgments should be taken up, and I think we are all working on this.

MS. WELLBERY: Thank you.

We have only a few minutes left for this panel, so I wanted to take any questions from the audience, if there were some.

MR. ABBOTT: With regard to --

MS. WELLBERY: Would you to identify yourself, please.

MR. ABBOTT: Yes, Alden Abbott, Commerce Department.

Perhaps the FTC might want to comment on this, the role of little FTC Acts and their private rights of action with regard to consumers' rights vis-a-vis companies that haven't lived up to trust marks, most little FTC Acts, as you may know, do have private rights of action, unlike the federal FTC Act. Is there

a problem, though, given the diversity of possible outcomes in different states?

MR. STEVENSON: The FTC Act does not -- to the extent -- I mean, one way to look at that question I guess is I take it that the panel's comfortable saying that there should be deception, perhaps, breach of warranty claims if somebody isn't living up to the ADR promises that they're making, and I think that would -- I mean, the deception would be deception regardless of the party-plaintiff. Obviously if you're dealing with an individual plaintiff, I would think that you would have a lot of challenges that the people have been identifying for the past hour and a half. So, you have got a claim, so what are you going to do with it as a practical matter?

I don't know if anyone else had a reaction to that question.

Do we have any other questions people would like to pose?

MS. GRANT: I have a question for Scott Donahey, because I don't think I really understand the point that you made, and so let me just ask you a question. If I'm buying a dress from a dressmaker in France and I've got a couple of dressmakers to choose from, one who has a mandatory ADR program that if I buy

the dress I have to go through and another that simply offers as an alternative if something goes wrong the fact that he or she participates in a program that I can take advantage of if I choose. Should I expect if I do business with the dressmaker that has simply given that as an option, not a requirement, that my dispute will be handled less well or that somehow I will be disadvantaged as a consumer if I make that choice?

MR. DONAHEY: Well, if I understand your question correctly, all I was saying was if you don't have that possibility of getting a binding remedy, going to court for a $300 dress is not going to give you any redress, and, of course, I think you have to evaluate the quality of the program, and you shouldn't agree to some program that you have no confidence in.

On the other hand, if you -- what I am proposing as the ultimate in a series of alternatives, including negotiation, where that's appropriate, mediation, and then binding decision if you're dissatisfied, is that that decision will be set up in some sort of mechanism that will be self-enforcing in the same way that the ICANN decisions are self-enforcing, that people that participate in these programs, it will automatically be enforced against them, whether it's a credit card charge-back, whether

it's a deduction from their bank account, a transfer to you, a wire transfer automatically, that this will be automatic enforcement. You won't have to use the New York Convention.

MS. GRANT: I just don't want to waste a lot of time setting up false dichotomies. I don't want us to be talking about a situation where I either have to take binding arbitration, mandatory binding arbitration or nothing, because I think that for the last couple of days, we've been hearing about all different possibilities that can exist and that can serve, you know --

MR. DONAHEY: I agree, and I think it's your choice as a consumer. I would hope that that would be one of the options that would be available to you and that somebody would not say we're not going to have any binding arbitration option, because they can go to court, because I don't think that's meaningful. I think that should be an option you can choose, amongst others.

MR. STEVENSON: Okay, well, I think that's the last word for this panel. What we'll do is we'll take a break. At 3:30, we will resume in the breakout sessions, and I think everybody has got an assignment to the breakout sessions, and we'll be able to help

direct you to the various rooms that's occurring, one of them is this one and then there are three others. We will start that at 3:30.

Then if you come back here by 5:00 and have a short concluding session. Thanks. I'd also like to thank especially this panel and especially the international visitors, I really appreciate Sidesh Bhojani and Tim Fenoulhet and Catherine Kessedjian and Mr. Yasunaga and others who traveled to be here to share their views. Thank you.

(A recess was taken.)

(Three breakout sessions, transcript under separate cover.)

MR. STEVENSON: Okay, now we will turn to five-minute summaries from the three breakout groups, starting with Maneesha Mithal, who will comment upon the one we had here.

MS. MITHAL: Thanks, Hugh.

We started off talking about the hypothetical, but then we had a general discussion about what the next step should be in this process, and I just wanted to kind of summarize five points that were made in our session.

The first one was we started talking about issues like independence and cost and general fairness

issues, and the interesting point was made that not only is fairness important, but it's the actual perception of fairness on the part of the consumers. A program can be, you know, very fair, but if it's not perceived as fair by the consumers, then there's a problem. So, that was an interesting point that was raised.

The second point that was raised was the -- in the session, the past sessions, we talked a lot about consumer education. Another point that was raised was that not only do we need to deal with consumer education, but we also should educate small and medium-sized enterprises, and several suggestions were made for doing that, you know, putting up more information on the website, contacting voluntary membership groups of internet startup organizations and that sort of thing.

A third point that was made was that we have to address the question of sanctions for nonperformance with ADR programs, and that might even be a separate issue from the ADR itself, but that's a very important point that people raised.

Fourth, someone raised the point that we should actually look to get more empirical evidence on ADR, as well as more information about the technological

innovations and new technological solutions, like the ones we heard yesterday from SquareTrade and CyberSettle.

MR. STEVENSON: Now we will hear from Kate Rodriguez.

MS. RODRIGUEZ: Okay, we were not very good in our group, we didn't stick to the hypothetical, but we had a free-flowing kind of discussion, but I think it was good. We sort of let it go in its own direction.

We spent a lot of time talking about guidelines and sort of baseline principles, whatever you might want to call them, for ADR and how these might work internationally. One idea was floated that stakeholders should be brought together on an international level with governments and international organizations sort of standing out around the circle, kind of looking and watching us as the stakeholders meet, consumer organizations, hammer out what they think are acceptable guidelines.

There was the point made of how do you get consensus, I mean how do you make sure that all the stakeholders are there, and if you're constantly trying to, you know, please all stakeholders, doesn't that or how does that -- how do you get away from watering down the baseline principles to such an extent that they

become meaningless? So, that's not a question we got an answer to, but an interesting point in the discussion.

Also, if you have too many, you know, proliferation of seal programs, how do you make sure that they're -- that they don't actually lower consumer confidence by confusing consumers and by being so large in number that they become meaningless? And the flip side of that, then, is the thought that, like other things we've seen in the marketplace, the good seal programs will sort of rise to the surface, and at the end of the day, you'll have, you know, three or five or so many seal programs that just, because they're good, because they really serve consumer interests and business interests, as well, that they will rise up as being the best programs to which people will recognize and trust, and so that the market will shake itself out.

MS. WELLBERY: We also talked about charge-backs.

MS. RODRIGUEZ: We did briefly talk about charge-backs.

MR. STEVENSON: Thank you, Kate.

We now have Dan Schumach to report from the third breakout session.

MR. SCHUMACH: I'm Dan Schumach. I was chosen to -- well, I volunteered to report on the third forum. We didn't get beyond the first set of questions, and within that first set, we spent an awful lot of time talking about the first two items on the list, which were independence and dependence section, on whether the people who are doing the dispute resolution ought to be independent. There was the acknowledgment that there's perhaps two separate kinds of ADR that are going on out there now.

One is more of a customer satisfaction process where the vendor itself may be the one providing the ADR, and another type is where a true neutral might get involved in the middle of a dispute, and no general agreement there on which is the better way to go but recognition that both those processes do exist, co-exist, side by side.

There was some discussion in our group that impartiality might actually be more important than actual independence, although we did have a gentleman with us from the European Union who noted that if you didn't have true independence, you would not be allowed to resolve the dispute in any of the EU member countries.

When we looked at the cost issues, there was a

uniform agreement in the group that on any hundred dollar transaction, there's just no way to have perfect justice, and to the extent that any system would be put in place here, it would have to be a system that would be cost-effective or the system couldn't exist at all, and this notion that rough justice would be your outcome took a couple of different forms. It was an acknowledgment that in some cases, your online dispute options might include filling out a checklist of what your grievance is and having some ADR applied or, you know, thumbs up or thumbs down to whether you had a good claim.

We also got into some hypothetical transactions with this notion that, well, if it's the dish transaction, the hypothetical, how somebody would prove whether the dishes came in and were broken or half the dishes were in the set. We did not come to a decision on what ought to happen, but we did acknowledge that in that context, at least, rules of procedure and rules of evidence if there is going to be any problem in the system be the only thing that's going to determine the outcome.

There was a good deal of discussion in the group about what kind of disclosures might help the system, and one gentleman in the group expressed a

great frustration that when he attempted to do some website surveys on what their dispute policies were, he had a very hard time going two and three levels down. Dispute resolution seems to have a very low priority for vendors in terms of disclosing. Some members had no disclosures at all, and the consumer would only find out about the procedures after they had a grievance that came about. Then in some instances, the possibility that the procedures had actually changed between the time of the sale and the time of the grievance being made.

We also thought that there was a value to requiring the ADR providers to make some type of disclosure about who they were, and possible disclosures there ranged from providing information that might be useful for the consumer to determine if there was any bias, such as a scorecard of outcomes, how many times do you come down in favor of the consumer versus coming down in favor of the vendor. It was in the context of disclosures, it seemed to be appropriate to have a vendor -- rather, the ADR provider describe who they are, what type of training or expertise they have and whether they have any relationship with the vendor, which would call into question whether they are biased.

Having not gotten terribly further than these things, we came to the conclusion that the costs of the ADR system is going to drive the nature and the quality of the ADR and the right to expect, and in that context, there is a general theme that proportionality is important. In, say, a $50 dispute, you shouldn't expect to get $500 worth of services at the expense of the vendor, yet if you had a $50,000 dispute, there could be a need for more substantial ADR process here.

And again, the conclusion -- the summary issue here was that we just have an awful lot of potential disputes that are so varied in nature that our group was unable solve the world's problems today.

MR. STEVENSON: Thank you, Dan.

We will turn now to my boss, Jodie Bernstein, the director of the Bureau of Consumer Protection at the Federal Trade Commission.

MS. BERNSTEIN: Thank you very much, Hugh, and I want, too, to add my thanks first to all of you who agreed to participate. I have ordered some T-shirts for you that would say "I served in alternative dispute regulation workshop," but they didn't arrive, and I don't know how I'm going to get that resolved, and maybe somebody could tell me. So, perhaps you'll join with me and we'll find a way to get those to you. I'm

not saying who I ordered it from, Barbara, because we wouldn't want to name names. Perhaps they had a deceptive message in the first place. I hope not.

I mean it, though, in all seriousness, that without you, we couldn't have had the two days of really very, very useful, helpful exchange of views on what we've all agreed to is a very, very critical issue in e-commerce generally, and we think there's been a lot of progress made already.

I do want -- I have another announcement, however, that since I incurred this now on two different forums, and that is the issue of the proliferation of seals and whether people have an ability to trust to them, if there are too many of them, do they know, do they understand, and I have heard that here. I also heard it last -- I guess it was two weeks ago when the Commission testified before the Commerce Committee of the United States Senate on privacy issues, and that same issue was raised, do people really understand, et cetera, et cetera.

You all have heard the arguments about proliferation and confusion. So, I do not yet have total approval either from the Commission or from the Secretary of Commerce, but I do have a concept that I think will solve it. It will be an FTC/Commerce seal,

and it will have my picture and Andy's on it, and I already explored the technology. Apparently, you know, if you like men better than women, you get Andy's face, and if you like women, something like that. I think it will cut through this whole business.

I know Barbara wants to be on it, too. If any of you do, please raise your hand before you go, because this is a real opportunity for all of us to really make some progress as we go forward. I think we'll take it up with the Europeans, who I think will like it a lot, because they'll have one place to look and won't have to deal with all these different sorts of things. So, obviously it is my job to bring back to you a proposal that will really cut through some of the difficulties here, and that was what I set out to do.

Do I have anything else to say that might be useful to you? Maybe a few things, because I do think that there were some areas of agreement, and in order to be brief, it's growing late, and you've all been working very hard, including our staff, I might add, and the Department of Commerce staff. It's really been a great opportunity for us to work together, and I know that will continue as we go forward, but I think we all were here to find ways to try to enhance consumer confidence, and obviously a make good mechanisms for

dispute resolution would go a long way to doing that.

Are there some principles -- and I am just going to be very brief about it -- that emerged where there is agreement, we have all discussed some of them for two days.

First, neutrality, third-party, impartiality, is obviously critical to the system. Low cost, whether it needs to be free or at some low cost, there was general agreement. We have heard some more discussion of cost, also. Accessibility, obviously it needs to be accessible to consumers. That goes to my program, of course, because we would make it -- and that's how they would know it would be accessible. Transparency, consumers need to have enough information at an earlier point in order to make sensible decisions about the use of the mechanism, and it needs to be timely.

So, what do we do to try to get to some of these, get further next steps some people might call them, because that's really what we want to talk about and think about as we go forward. First, I guess, is the international nature of what we're dealing with means that we need to foster international cooperation with the stakeholders, and I think this has been a mechanism for finding ways to do that.

We need to continue cooperation between the

government, business, the consumer groups, and one of the things that I know has been useful in other areas is when business or even consumer groups establish pilot projects, and we have some real life experience about what works and what doesn't work. I know that there have already been some. More and more useful ones I think can inform and educate all of us.

Technological innovation has been discussed here, also, companies like CyberSettle and SquareTrade, and we thank you, again, for the reception last night. The new technologies really can be very helpful in developing new options that have never before been available to consumers. Consumer education, we've already talked about, and all of us I know will have a role in developing more and more sophisticated programs of consumer education and business education, as well, I think we just heard that.

One size will not fit all I think was a level of general agreement, and so we would encourage different kinds of programs and hopefully will end up with a number of different types for different situations.

Government enforcement of unfair, deceptive disclosures, that was also talked about, and we are here, aren't we, cybercops, to hopefully be on the job

where promises are not kept or where programs don't deliver. The law of deception covers those, and we would anticipate, with others, a vigorous enforcement program. That seemed to be an area of agreement.

Finally, I think there is only a couple of more thoughts, and that is to ensure consumers' access, we want to make sure that the redress programs, which are so critical, do not unduly burden businesses, and along those lines, I have two examples. First, pursuing international rankings on judgment recognition and enforcement would go a long way toward making the dispute resolution programs work well, at the same time enhancing the ability to have an underpinning of law enforcement.

And second, increasing international law enforcement cooperation, so that the law enforcement agencies can be more successful in pursuing cross-border fraud. That will also be helpful in underscoring both systems or the underpinnings for both systems.

Once again, I want to thank you all for coming. I don't intend to charge for the seals, so I think they're going to be free, except for shipping and handling, of course. Thank you very much.

(Applause.)

MR. PINCUS: It's always impossible to follow Jodie, and I'm just nervous that her seal is going to be more popular than mine, because, you know, a Jewish mother is sort of the ultimate guarantee.

MS. BERNSTEIN: And Andy knows I'm the ultimate Jewish mother.

MR. PINCUS: I'll be very brief, because I think Jodie really covered the key points. I want to thank all of you, especially those that stayed until the bitter end, and I really want to thank everyone who worked on this, but especially Hugh and Barbara, who really did a tremendous, tremendous amount to make this possible.

(Applause.)

MR. PINCUS: I agree with everything that Jodie said, and I guess I'd just echo the no one size fits all point, because it seem seems to me that really was drawn home in the systems that were demonstrated and specifically talked about here and in the commentary and the comments that other people have made, and it seems to me that that means that we really need to allow a period for development to see what happens out there in the marketplace in terms of technology, in terms of business models, recognizing that we have some underlying principles, but also realizing that they may

play out quite differently in different situations and especially with regard to proportionality as time goes by, and so we need to get some experience, which I think really means urging the business community to do what some have done, and to really get -- not just talk about it, but get those pilot projects out there working so we can see how they work, see how consumers react to them, see what they do to bolster confidence in order to begin to identify the key elements that really make these systems work.

It seems to me, and maybe because I've been spending a lot of my days working on electronic signatures, it's sort of burning into my brain, but it does seem to remind me a little bit about the early days of electronic signatures, where people were saying -- some people said, well, we know there is going to be one EKI infrastructure, and so we just have to figure out how that's going to work, and everybody would be using the same electronic signature, and as the years have gone by it's become quite clear that, in fact, not only are there very different technologies that are appropriate for different situations and different prices, but there are different business models that make one or another kind of technology more appropriate for that situation.

The ADR area seems very similar to me in that as consumer commerce grows, and it really -- although it's growing, our figures that we've released show it's still an infinitesimal portion of overall commerce, we'll see those business models develop, see what consumers are really looking for, see what the price points are and get some more experience that really allows us to draw some concludes about what works and what doesn't. But in the meantime, we obviously want to keep talking to you, and we hope you'll keep talking to us, both -- and we're sure you will, anyway, both people in the consumer community, business community, keep talking to each other so we can all compare results, see what's working and urge each other to continue to explore this medium.

So, thank you very much, again, for coming, and we look forward to continuing this dialogue. Thanks.

(Applause.)

(Whereupon, at 5:30 p.m., the conference was concluded.)

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C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P004309
CASE TITLE: ADR CONFERENCE, VOL. 2
DATE: JUNE 7, 2000

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JUNE 19, 2000

SUSANNE BERGLING, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE